

# PUBLIC POLICY

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PART I

WAR MORALE AND CIVIL LIBERTIES

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## MORALE AND ITS MEASUREMENT

*Gordon W. Allport*

OVERNIGHT the attack on Pearl Harbor unified the purpose and strengthened the will of the American people. Shortly before that attack public-opinion polls were showing that not more than 30 per cent of the population favored an immediate declaration of war against the Axis powers; shortly afterward the returns showed that 97 per cent approved the Congressional declarations of war. It is *external* events that are the great sculptors of the public attitude. By comparison, the agitations of orators, propagandists, and assorted morale committees are relatively ineffectual.

The maintaining of national morale during the turbulent months and years that lie ahead is a task with which many public administrators will be directly or indirectly concerned. The Pearl Harbor honeymoon will last a few months at most. Following it comes the need for satisfactory adjustment to the more monotonous stretch that lies ahead.

In equipping himself for the task of maintaining morale in wartime (as in peacetime) the administrator requires knowledge (a) of the *nature* of morale, (b) of the *state* of morale in the country as a whole and in those segments of the population with which he has principal contact, and (c) of the *techniques* he may employ in keeping morale at a high level. It is with the first two of these requirements that we are here especially concerned.

To discover the *state* of morale a variety of sources should be explored, for the mental and emotional tone of a nation is expressed in many diverse channels of activity. The pages that follow review a wide range of possible sources. Illustrative findings are reported, but it is not the specific facts themselves that are of importance (for they rapidly go out of date), but rather the demonstration that the sources tapped may be utilized with profit by anyone interested in determining in an objective manner the condition of public morale at any given time. Better still, these sources—expanded or contracted as experience proves necessary—may constitute a framework for

the construction of an *index* of morale. Used repeatedly, at convenient intervals of time, such an index may be expected to yield reliable evidence of *trends* in morale, not only for the nation as a whole but for any special group which may be of particular interest to a given governmental or private agency.

#### THE NATURE OF MORALE

The popularity of a term, it is said, is proportional to its vagueness. When asked what *he* meant by morale, an army officer replied, "It is the assurance you have while walking down the street that when you wink at a girl she will wink back at you." Serene and pleasing as this state of mind may be, it seems scarcely broad or deep enough to represent that psychological condition upon which our national safety is said to depend.

Somewhat more adequate, and equally brief, is the definition of Rundquist and Sletto, who regard morale as *one's confidence in one's ability to cope with whatever the future may bring*.<sup>1</sup> But this crisp definition implies more than it says. It implies, first, that there is a condition of healthy tonus in the person that supplies him with a diffuse feeling of confidence and courage; and secondly, that he has a set of specific aims and abilities which equip him to cope effectively with whatever threats the future has in store.

These two attributes of morale: the ground condition of health, tonus, courage, and preparedness for action; and the figure condition of specific aims, purposes, and skill, are indeed the two basic ingredients that demand our attention. There can be no high morale unless there is something definite to achieve, a well-identified goal to attain or a well-marked adversary to contend with.

Yet a third factor enters into morale, namely, the harmony of the individual's aims with those of his social group. Fundamentally men are interdependent, at least when the basic conditions of their lives are being attacked. Under these circumstances the convictions and values of the individual must not differ too radically from those shared by the group of which he is a member. If they do, then the group, torn by cross-pur-

<sup>1</sup> Edward A. Rundquist and Raymond F. Sletto, *Personality in the Depression* (Minneapolis: University of Minnesota Press, 1936).

poses, must be said to have low morale. This requirement that individual goals and individual values shall agree with the group goals and group values is much less imperative in peacetime than it is in wartime, when the existence of both the individual and the group are simultaneously threatened.

And so on the basis of these preliminary considerations let us agree to mean by *high morale* (1) the healthful state of a person's convictions and values that supplies him with abundant energy and confidence in facing the future, (2) the zestful, decisive, coöordinated effort on the part of the individual for the purpose of achieving specific goals that agree with his personal convictions and values, and (3) the agreement among citizens (especially in wartime) in respect to their purposes and objectives.

In ordinary times we disregard the problem of morale. After the Armistice of 1918, psychologists and social scientists laid the concept on the shelf and did not bring it back for use until the depression created a domestic emergency. At that time it was again realized that the emotional and mental state of our citizens, especially of the unemployed, created a major problem in national welfare. And now, on top of ten years of depression and twenty years of disillusionment regarding wars that pretend to end wars, a catastrophic conflict is upon us. Whether our psychological capacity to meet the future is equal to the coming test is the question that all are asking. The course we, as a nation, will follow for years to come will not be determined exclusively by the impact of external events, but will be determined more surely by the undercurrent of our sentiments, by our mental elasticity, by our firmness of will and definiteness of aim, and above all by our national unity.

In surveying such evidence as is now available concerning the state of morale, we may follow the three stages in our definition, attempting to find as satisfactory answers as we can to three questions:

- (1) Are the ground conditions healthy? That is to say, are our convictions firm and our resources in confidence and courage adequate?
- (2) Do we as individuals have definite aims and decisive purposes that will transform our sentiments and courage into effective action?

(3) Do our aims agree? Are we thinking together in this crisis?  
As a nation, have we unity?

#### THE GROUND CONDITION

So many different aspects of our national life enter into the groundwork of morale that we glean our evidence from widely different sources. To commence with a broad sociological index, we first inspect the suicide rate.

From the compilations of the Metropolitan Life Insurance Company we learn that for five years preceding 1939 the suicide rate per 100,000 of the general population was more than 9. But late in 1939 it suddenly began to fall: in 1940 the rate was 8.5; and for the first seven months of 1941, 7.5, the lowest in fifteen years for corresponding months.<sup>2</sup> If sociologists are right in telling us that suicide rates provide a genuine index of social disruption, we may infer from this evidence that when people are caught up in a national emergency their self-centeredness diminishes and the suicide rate falls. The argument holds that if marginal cases of mental equilibrium show a tendency to turn away from suicide, the effect presumably runs in a corresponding degree throughout the whole social structure. A nation, then, moving away from a high suicide rate is moving toward a state of high morale. So far as it goes, this fragment of evidence for the emotional health of the nation is favorable.

Statistics pertaining to the type and frequency of mental illness and crime will likewise be relevant, although as yet they have not been compiled or interpreted for this country. It is an interesting fact that in England, even under conditions of intense air bombardment, the number of mental breakdowns has not appreciably increased, and some cases actually seem to be cured under the strain.<sup>3</sup>

Still bearing on the ground conditions of national health is

<sup>2</sup> Metropolitan Life Insurance Company, *Statistical Bulletin*, vol. XXII, no. 8 (August 1941). It should be pointed out that these statistics concern suicides among the relatively well-to-do sections of the population. For this reason it is preferable to use the reports of the U. S. Bureau of the Census as soon as these reports for the current year become available.

<sup>3</sup> P. E. Vernon, "Psychological Effects of Air-Raids," *Journal of Abnormal and Social Psychology*, vol. XXXVI, no. 4 (October 1941), pp. 457-476. E. Glover, "Notes on the Psychological Effects of War Conditions on the Civilian Population," *International Journal of Psychoanalysis*, vol. XXII, part 2 (1941), pp. 132-146.

the evidence we obtain from industrial statistics. We know that there have been vast increases in production, in employment, and in pay rolls. Factory output in the first six months of 1941 was 29 per cent greater than in the first half of 1940; in the same period the number of employed workers increased by 19 per cent, and pay rolls by 43 per cent.<sup>4</sup> In the meantime the cost of living rose less than 10 per cent, leaving a tidy margin in favor of a rising standard of living and greater security and contentment among the workers. The reemployment of millions of marginal workers is unquestionably one of the most important single factors in the improvement of confidence and courage. The researches of many investigators show beyond a shadow of doubt that for the American a job is the symbol of status, independence, and worth, all of which are essential for a healthful condition of morale.<sup>5</sup>

At the same time, before the war broke out there were disturbing facts. In May 1941 there were 40 per cent more strikes than had been customary in the month of May for the preceding five-year period.<sup>6</sup> Most of these strikes were of short duration and only 13 per cent were entirely unsuccessful from the point of view of the workers' demands.<sup>7</sup>

Overtly, most strikes are concerned with the issue of wages, but it must not be forgotten that deep currents of unrest lie beneath the surface demands of strikers. Wages are frequently of less importance to the worker than are considerations of status and recognition for services, of less importance even than friendly relations with his fellow-employees and with the boss.<sup>8</sup> Wages are more than wages; they are the symbols of

<sup>4</sup> United States Department of Labor, Bureau of Labor Statistics, Washington, *Labor Information Bulletin*, vol. VIII, no. 9 (September 1941), p. 5. For the month of August there was a further drop of 800,000 in the number of unemployed, and the trend is constantly downward.

<sup>5</sup> Delbert C. Miller, "Morale of College-Trained Adults," *American Sociological Review*, vol. V, no. 6 (December 1940), pp. 880-889; also "Personality Factors in the Morale of College-Trained Adults," *Sociometry*, vol. III, no. 4 (October 1940), pp. 367-382. S. N. F. Chant and C. R. Myers, "An Approach to the Measurement of Mental Health," *American Journal of Orthopsychiatry*, vol. VI, no. 1 (January 1936), pp. 134-140. E. A. Rundquist and R. F. Sletto, *op. cit.* O. Milton Hall, "Attitudes and Unemployment," *Archives of Psychology*, vol. XXV, no. 165 (March 1934), pp. 5-65.

<sup>6</sup> United States Department of Labor, Press Release of August 1, 1941.

<sup>7</sup> United States Department of Labor, Bureau of Labor Statistics, Washington, *Labor Information Bulletin*, vol. VIII, no. 5 (May 1941), pp. 9f.

<sup>8</sup> Goodwin Watson, "Work Satisfaction," ch. vi, pp. 114-124, in *Industrial Conflict: a Psychological Interpretation* (edited by George Hartmann, New York: The

status, and often a substitute gratification for the recognition that is lacking. Hence, even with rising wages and temporary security of employment, the worker continues to demand an enhancement of his sense of status. He could (and should) receive merited praise and recognition for his services; he could (and should) know that he is an indispensable man.

Up to the outbreak of war it was commonly agreed that industrial morale was low. Even now the specter of unemployment in nondefense industries, in those not entitled to priorities, is disturbing. Small industries without defense orders are folding up, causing distress to management and workers alike. Deeper and more important is the report that workers and management have not yet formed an effective team. There are many instances where each exploits the crisis in a way to feather his own nest. Of the many proposals that workers and management be brought together to plan for all-out efforts, few as yet have been successful.

If we are frank with ourselves, we will admit that as a people we hope for personal profit even from a national emergency. In the last war there developed the extraordinary habit of patriotism-plus-ten-per cent. Our standard of living, high as it is, is a source of constant anxiety to us, and we shall not easily relinquish it even to save our inner lives. Having neither the tradition of voluntary poverty nor of enforced sacrifice through stringent taxation or rationing, we must not expect lightly to set aside ingrained habits of economic self-seeking.

There is, to be sure, plenty of *verbal* evidence of willingness to sacrifice. In August 1941 a *Fortune* poll asked what sacrifices people would willingly make if the United States were actually at war. Three quarters replied that they would willingly pay double the existing luxury taxes as well as a sales tax on everything they bought. Eighty-nine per cent of both men and women signified their willingness to give one day a week to training for defense or Red Cross work. The Gallup polls for September indicated that while only 26 per cent of the people felt that they had as yet made personal sacrifices as a result of the war, 75 per cent expected that during the coming twelve

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Cordon Company, 1939). Also Fritz J. Roethlisberger and William J. Dickson, *Management and the Worker*; an account of a research program conducted by the Western Electric Company, Hawthorne Works, Chicago (Cambridge, Massachusetts: Harvard University Press, 1939).

months they would have to make such sacrifices. The psychological problem here involved is whether expressed willingness and expectation can be translated for the duration of the war into uncomplaining action.

The polls have given us other valuable evidence on the state of our sentiments. An interesting result came to light in answer to the question, "If you were living under a dictatorship instead of under our present form of government, in what way do you think you, personally, would be most affected?" Spontaneously the majority of people in all parts of the country replied that they would feel most keenly the loss of their personal freedom. It is significant that the Pacific and Rocky Mountain regions gave this reply about 18 per cent more frequently than did the eastern regions of the country. It would seem that in the West, where the frontier tradition is recent, where every family is aware of its pioneering, the hatred of restriction and the love of liberty are especially prominent. Yet, East or West, if we except the Indian, not a single family in America is devoid of the tradition of seeking liberty. At some time in our family histories either we or our ancestors made great sacrifices to secure fresh air, elbow room, and security from tyrants or tyrannical conditions. This common tradition of liberty is the overwhelming asset in our national morale.

Morale tests and scales, which are only in their preliminary stages of development, are designed to throw additional light on the groundwork factors in morale.<sup>9</sup> Harding, before the war, standardized his scale against groups of known high and low morale, and found evidence of four component factors which he called *confidence*, *tolerance*, *realism*, and *democratic idealism*. Working in England under combat conditions, Vernon found somewhat analogous factors in *confidence-cheerfulness-social cohesion*, *realism*, and *doggedness*. Since these scales are still in the research stage we are unable yet to report whether they have merit in measuring the height of morale as a whole, or of the separate components in morale, in various regions of the country and among various classes of the population. They

<sup>9</sup> John S. Harding, "A Scale for Measuring Civilian Morale," *Journal of Psychology*, vol. XII, first half (July 1941), pp. 101-110; Delbert C. Miller, "The Measurement of National Morale," *American Sociological Review*, vol. VI, no. 4 (August 1941), pp. 487-498; E. A. Rundquist and R. F. Sletto, *op. cit.*; P. E. Vernon, "An Analysis of the Conception of Morale," *Character and Personality*, vol. IX, no. 4 (June 1941), pp. 283-294.

are, however, promising enough to receive a thorough testing.

As the war settles down to grim monotony we shall need to keep tabs on the American habit of destructive criticism. It is common to encounter savage and demoralizing complaints regarding this or that governmental policy or personage. Normally, the President himself is our favorite scapegoat. Tradition has determined that he shall not be looked upon as a king, a beloved father around whom all may rally in times of peril. Rather he is blamed for almost everything. A stanch Maine Republican riding over a bump in the road grumbled, "This is a Roosevelt road." As the war continues we may expect captiousness to return.

Unbridled criticism brings no sense of security in an emergency. This is true even though we cannot be deprived of the privilege of complaint without damage to our morale, and even though constructive use of criticism during the war has been demonstrated in England. An example of England's handling of the problems is the ingenious invention of "Grumble Clubs" to provide a safety valve for citizens in a given neighborhood. Release of annoyance through good-natured chatter has the effect of strengthening fundamental loyalty.

One way to obtain evidence on the extent of and character of criticalness is the method of eavesdropping sometimes employed in social psychology: recording conversations overheard on the street or in social gatherings, for the purpose of ascertaining what percentage of the conversations are captious in tone.<sup>10</sup> From the point of view of morale-building, if the ratio is dangerously one-sided, we might then encourage people to make at least one appreciative remark about their government for every remark that is critical, or we too might inaugurate "Grumble Clubs."

A dangerously inhibitory factor in our mental frame is the cynicism of the deadly parallel. A few years ago (according to the polls) the war of 1917-18 was regarded as a mistake by the majority of Americans; by many it still is. For that reason there is a cynical belief that we shall find ourselves caught twice in the same trap. The mockery of the slogans of 1917, which make many of us smart with humiliation today, still engenders a distrust of all assertions of democratic idealism.

<sup>10</sup> Cf. H. T. Moore, "Further Data Concerning Sex Difference," *Journal of Abnormal and Social Psychology*, vol. XVII, no. 2 (July-September 1922), pp. 210-214.

Cynicism takes another form—carefully nourished by Nazi propaganda—the distrust of democracies for their alleged inability to make quick decisions in wartime and to evolve effective instruments of action. In a certain college shortly before the war the majority of students responding to a questionnaire endorsed the statement, "By its very nature a democratic form of government is unable to make quick and efficient decisions." Like other Americans, these students are conscious enough of political confusion and the roundabout processes of democracy, but they are uninstructed regarding the remarkable efficiency of many units and departments within our government.

Embedded deep in the background of our national life is our sense of humor. Humor, we know, helps us over the rough spots in our personal lives; it also irons out friction between individuals. And when it is barbed with wit it becomes a powerful weapon in reducing to dust the pompous pretensions of an adversary. Humor reduces fear. We cannot doubt that the pranks of the Norwegians, the Dutch, and the French, edged as they are with ridicule, buoy up their own spirits while they deflate the arrogance of their conquerors. Especially vulnerable to witty attacks are the absurdities of the racial myth, the "whopping lies" of the Nazi propagandist, his spurious science, and his heavy self-importance. A survey of American periodicals and moving pictures will show to what extent gaiety and perspective of humor are being developed. Since humorists multiply our assets in morale, we should multiply our humorists.

A final factor in our background seems almost too self-evident to require facts and figures. I refer to the intense, if sporadic, seizures of coöperative activity that occur in our communities. Whenever they are well organized, campaigns of aluminum gathering, money raising, bond selling are almost invariably successful. The Californian mentality is not peculiar to the West; it is spread from coast to coast. Americans delight in putting something over, in going over the top. To be on a winning team is a thrill which all Americans understand.

#### HOW DEFINITE ARE OUR AIMS?

With this background of sentiments and attitudes in mind we come to the question whether as individuals we have clear-cut aims that will channel vague purposes into definite action.

Convictions, traditions, values, determination are not enough. To be effective they must be expressed in a coördinated plan of conduct.

Concerning the desire of virtually every citizen to do something specific for national defense there can be no doubt. Service committees of one type or another are embarrassed by the plentifulness of volunteers and can scarcely keep all the willing hands at work. The number of organizations active in the defense and extension of democratic principles is astounding. The precise number of such organizations would be difficult to determine. One file contains the names of many hundreds. In Massachusetts in the month of February 1942, more than 300,000 citizens were registered for volunteer work with the State Committee for Public Safety.

In spite of this favorable enthusiasm and willingness to work we have a serious fact to face. Those who have a will to pitch in and help feel a lack of definiteness in their opportunities and a suspicion that their efforts are unavailing. Voluntary mobilization has by no means progressed to the point where each citizen feels that he has an assignment that will help to win the war.

Evidence from England shows that morale is greatly improved during air raids if people have a specific task to perform. Air-raid wardens and those with definite assignments manifest much less fear than do citizens whose energies are not mobilized for specific action under conditions of strain.<sup>11</sup>

A job for everyone, for every man, woman, and child, should be the aim of private and public morale-building organizations. Participation alleviates anxiety. Idle talk, rumor, complaint are symptoms of a frustrated desire to participate. Assuming, as we may, that our people desire to win the war, and then to win the peace, these broad goals have to be reduced to specific, day-to-day, objectives in order to be accomplished. It is only the *leaders* in the community who are able to effect this reduction, to direct vagueness of will into coördinated movement. Can administrators answer the question that millions of Americans are asking, "Just what can I do?" We need administrators who can.

<sup>11</sup> P. E. Vernon, "Psychological Effects of Air-Raids," *Journal of Abnormal and Social Psychology*, vol. XXXVI, no. 4 (October 1941), pp. 457-476.

## HOW WELL DO OUR AIMS AGREE?

It is a psychological fact that the more vague a statement of goals, the greater the number of people who will agree with it. Few would oppose a call to win the war and to win the peace. But since there are different ways to implement a general purpose, there are necessarily many grounds for disagreement when it comes to a specific call for a definite action. Because of this fact there will be quarrels over strategy during the war and many more quarrels after the war—even assuming that general aims remain in agreement. One method of reducing the demoralizing effects of this disagreement is to have repeated measures of the *unity* of general aim and to emphasize the findings, thus keeping in true perspective the evidence of disagreement regarding strategy and means.

How many of our inhabitants do not agree with the fundamental American aim of winning the war we do not know. Not every "enemy alien" is a potential saboteur or fifth-columnist. In fact, very few of them are. Among the four and a half million Italian-Americans in this country, Professor Salvemini estimated, before the war began, that about 5 per cent were militant Fascists, many of whom might attempt to undermine the country of their adoption.<sup>12</sup> A study made in May 1941, based on a questionnaire taking the response of an audience to a Nazi propaganda film, found that about 4 or 5 per cent showed pro-Nazi leanings.<sup>13</sup> In ordinary times, of course, our country can absorb such disaffected and subversive groups, but in a crisis it is less easy to do so. Hitler, we know, has boasted that the downfall of the United States will be brought about by an inside job. This threat and the Nazi strategy of propaganda are not well known to most Americans. Nazi short-wave propaganda shows constant attempts to drive wedges wherever wedges can be driven: at the Mason-Dixon Line, at the Mississippi, at the Hudson River; between racial groups; between people and their newspapers; above all between people and their leaders.<sup>14</sup> Of the short-wave material coming

<sup>12</sup> Gaetano Salvemini, *Italian Fascist Activities in the United States* (Washington: American Council on Public Affairs, 1940), p. 18.

<sup>13</sup> Jerome S. Bruner and George Fowler, "The Strategy of Terror: Audience Response to 'Blitzkrieg im Westen,'" *Journal of Abnormal and Social Psychology*, vol. XXXVI, no. 4 (October 1941), pp. 561-574.

<sup>14</sup> J. S. Bruner, "The Dimensions of Propaganda: German Short-Wave Broadcasts to America," *Journal of Abnormal and Social Psychology*, vol. XXXVI, no. 3 (July 1941), pp. 311-337.

from Germany during the last months of 1941, half of it was concentrated on discrediting our President.

Since the strategy of the Axis propaganda is dissolvent or wedge-driving, its effects on our many minority groups are a matter of constant concern. Special watch, too, needs to be kept on the perils of that irrational psychological process that turns aggressiveness suddenly upon scapegoats within the nation, rather than upon the more genuine menace outside. Students of morale will do well to watch the incidence of aggression against Jews, Negroes, and "enemy aliens."

#### SOURCES OF EVIDENCE

The value of the foregoing appraisal of national morale is limited by its transiency, but sound sources of information, when known, can be used again and again. The following list, upon which the present survey has been based, is probably incomplete, but it is offered as a starting point for fact-finders. A suitable governmental agency employing it could, with growing experience, improve upon it.

#### *Sources of Evidence Pertaining to National Morale*

1. Suicide rate
2. Mental illness, delinquency, and crime
  - a. frequency
  - b. types
3. Industrial sources
  - a. production in relation to capacity
  - b. extent of employment
  - c. priorities unemployment
  - d. wages in relation to cost of living
  - e. discrepancies in wages for same work
  - f. strikes
  - g. job satisfaction
  - h. employment of labor consultants
  - i. meetings of management and workers
  - j. coöperative planning by industries in blocs
  - k. tax evasions by individuals and corporations
  - l. systematic interviews
  - m. sabotage
  - n. participant observation

4. Morale scales
  - a. Harding, J. S.<sup>15</sup>
  - b. Miller, D. C.<sup>16</sup>
  - c. Rundquist, E. A. and Sletto, R. F.<sup>17</sup>
  - d. Vernon, P. E.<sup>18</sup>
5. Public-opinion polls
  - a. awareness of threat to national safety
  - b. willingness to sacrifice
  - c. expectations of sacrifice
  - d. confidence in news
  - e. attitudes toward dictatorship and democracy
  - f. agreement with proposed policies
  - g. agreement with current policies
  - h. confidence in leaders
  - i. confidence in success
  - j. attitudes toward morale in combat service
  - k. regional-racial-sex-occupational-religious differences
6. Media of communication
  - a. letters to editors
  - b. editorial policies
  - c. feature writing
  - d. columns
  - e. character of news writing
  - f. character of radio programs
  - g. character of moving pictures
  - h. analysis of humor
  - i. best sellers
7. Interviews and observations
  - a. total community studies
  - b. reports of social workers, psychiatrists, teachers, and clergy
  - c. conversations overheard
  - d. character of rumors
8. Coöperative activities
  - a. number of volunteer organizations for protection and extension of democracy

<sup>15</sup> John S. Harding, "A Scale for Measuring Civilian Morale," *op. cit.*

<sup>16</sup> Delbert C. Miller, "The Measurement of National Morale," *American Sociological Review*, vol. VI, no. 4 (August 1941), pp. 487-498.

<sup>17</sup> E. A. Rundquist and R. F. Sletto, *Personality in the Depression*, *op. cit.*

<sup>18</sup> Philip E. Vernon, "An Analysis of the Conception of Morale," *Character and Personality*, vol. IX, no. 4 (June 1941), pp. 283-294.

- b. membership in these organizations
- c. volunteers for Civilian Defense, Red Cross, etc.
- d. Defense Bond Drive
- e. financial contributions to U.S.O., etc.
- f. aluminum collections, etc.
- g. satisfaction of each person with his role in national defense

9. Sources for minority groups
  - a. the press and radio programs of minority groups
  - b. character of assemblies
  - c. short-wave listening
  - d. case studies
10. Audience responses
  - a. frequency of various types of meetings
  - b. attendance at various types of meetings
  - c. applause and hissing
  - d. character and intensity of heckling
  - e. outbreaks of violence

Special sources for morale in combat services:

Eye-witness accounts and sampling surveys.

Statistics on desertions, AWOL, suicides, records of insubordination, disciplinary action, fights, requests for transfer, conduct in war games, malingering, volunteers for special duties.

Raters may observe and evaluate: number and nature of rumors, number and nature of anti-army jokes and anecdotes, occurrence of defamatory writing in public places, disgruntled talk, response to newsreels (cheering and hissing), factions and cliques, charges of favoritism, response to rituals and traditions, evidences of pride in unit, tolerance of minority groups, expressions of discouragement about family or post-army employment, interest or apathy respecting news, attitude toward officers, toward prospects for advancement, pay, and toward one's status as a member of the armed service.

#### CONCLUSION

It is not possible to add up algebraically our assets and liabilities in national morale, for the factors involved are not com-

mensurable. The best we can hope to do from empirical surveys is to identify factors in morale which seem to be low, and factors which seem to be high, and to plot the trends in these factors over a period of time. In the present war psychological and social science can aid in the construction of a better morale index than has ever been used before.<sup>19</sup> The techniques of polling, of community study, of reporting are at hand, and experts are available to employ them. Governmental agencies, we know, are disposed to utilize such sound sources of morale measurement as are available. Administrators of all grades, however, will do well to keep themselves informed concerning this area of social investigation, and to be alert to changes in evidence day by day.

It is a marked limitation of the psychological and social sciences that they deal with actualities and not with potentialities. Crises in our lives, curiously enough, are not unwelcome. Adventure and risk are stimulants, bringing pleasing interruptions to our routine, and thrilling us with hope for some unexpected improvement in our destinies. This exhilaration often increases as danger advances. The present war has shown how in common men there are reserves of physical and mental tenacity released even under conditions of horror that might be expected to shatter health and sanity. There is no reason to suppose that our American potentials in morale are lower than those of the British, Norwegians, or Czechs. But in advance of the crisis that will call these potentials forth it is difficult—perhaps impossible—for the scientist to measure them. He can, however, as this article has shown, do a fairly satisfactory job of gauging the actual state of morale at any given time.

<sup>19</sup> The "morale chart" employed by the War Department to trace changes within Germany in 1918 was a good idea, feebly executed. See G. G. Bruntz, *Allied Propaganda and the Collapse of the German Empire in 1918* (Stanford University, California, 1938), p. 192.

## THE INTEGRATION OF MORALE

*Edward L. Bernays*

AMERICA's morale can be made impregnable. We have the material and psychological resources. Only an organized, integrated approach to the problem and effective carrying out of planned activities are lacking.

A threefold approach is called for: first, activities aimed at speaking up for democracy, defining, explaining, expounding what democracy is and is not; second, activities aimed at strengthening democracy, making it work better, so that all may know what we are fighting for; third, a morale commission appointed by the government to give counsel and advice to men in the government so that they may function more democratically and more efficiently.

Two overwhelming facts face us in our national war effort. One is our reliance on physical resources. We depend on materials to provide the physical armaments of offense and defense—guns, ships, tanks, ammunition, machines, airplanes—and on man power to make use of them.

The other fact is our reliance on the morale factors, the attitudes of our people. Attitudes control the actions of the men who operate the machinery we are creating and of the civilians back of that machinery. Unless we are well equipped physically and ideologically in both these equally important fields, we are failing in our war effort for democracy.

These two forces in our national war effort are interdependent. Both should receive equal thought and action. We are turning to scientists and inventors, to armament experts and our tremendous industrial machinery for the building of our physical armaments. We are appropriating half of our national income in 1942 for arms and armaments. We are attempting to make this expenditure as effective as possible to assure America's protection against external enemies. The effective use of our physical resources depends to a great extent on our morale. Our main considerations in this paper are the problems of maintaining morale.

## THE PSYCHOLOGICAL RAMPARTS

*Morale, Our First Line of Defense*

Our first real line of defense is in our minds. They can ensure that our arms shall defend what they were created to defend. France fell with much of her army and armaments intact, in part because her people were not wholeheartedly in the fight to save democracy for themselves. The weapons created by the French to defend their democracy are being used now for entirely different purposes from those they were intended for.

A faith of the people in the future of democracy is of primary importance for a strong national morale. Faith is the evidence of things hoped for. Our people need to have the will to defend democracy, even to die for it, if need be. Arms and armaments are not enough. The intangibles are as important as the tangibles.

*Morale Defined*

"What 'condition' is to the athlete's body, morale is to the mind," says William Ernest Hocking. National morale is behavior which affects our national interest. A strong national morale is behavior which advances our national interest potently. Weak national morale does the opposite.

Physical and emotional well-being condition an individual's morale. When an individual has a definite goal, a leader whom he trusts, a belief in his fellow citizens which he will exert in the face of obstacles and dangers, his morale will be strong.

Group morale is the fusion of individual morales. It too can be weak or strong, depending on the strength of its component elements.

With a strong national morale, the men and women of the country are keen, enthusiastic, working in unison behind common leaders toward common goals. This indicates their faith in the future. With low morale, a country suffers from frustration, apathy, confusion.

Under war conditions, a strong national morale is essential to overcome hazards, pain, hunger, and other shocks and to withstand the sacrifices we all shall have to make.

How can we build morale?

*The Basis of Enemy Morale*

In our country the problem is different from what it was in Nazi Germany. There a common goal of *Lebensraum* was trumped up. The desire for more land and raw material was made the goal. Since leadership was not based on the consent of those who were governed, but on regimenting them through force, threat, intimidation, brutality, and, in addition, censorship and propaganda, a leader, once he assumed control, was able to consolidate his position. With a false goal and a leader who used force, threat, coercion, and intimidation, propaganda and censorship, plus a homogenous population, false faith was established, strengthened in turn by success in arms.

*Democratic Morale*

In the United States we have and want no goals outside those that exist in our own country. We have no desire for imperialism, for riches, for the lands of others. We do not as a nation need food or clothing. We can find our goal right here—the goal of democracy. With all our food and clothing and raw materials we still all haven't got as much as we need of everything. We have still the underprivileged "Third of a Nation."

However, we have a basis for a strong, unassailable morale, because we have both the physical resources and the psychological resources to merit a belief in our own future. It should be possible to establish this belief in our future—our common goals, our leaders, and ourselves—if we go about it intelligently.

Our definition of morale needs to be all-embracing. The physical and psychic happiness of men in the army and navy represents one important aspect of morale, but this is as the aspect of two million to one hundred and thirty million, a segmental and minor approach. The need for real morale, the building of psychological and economic security for all the people, is broader than that.

*Strong Morale Depends on Security*

Nor is the attitude of the civilian population toward the armed services the basic problem of morale. We can have a strong morale of the civilian population and a weak morale of the armed forces. Exhortations, talks, discussions, forums, or any single or multiple series of activities will not make a strong

morale. We cannot depend on verbalism. Words alone create emotional fervors, but they also create emotional hangovers. Words need realities behind them. Nor can we depend on censorship and propaganda, on threat, intimidation, or brutality, or on any other brutalized totalitarian methods. Morale goes right back to this: the psychological and physical well-being of a people expressed in a faith in their future; goals they are willing to fight for, to shed blood, sweat, and tears for despite dangers and sacrifices; faith in their chosen leaders and in one another. The future of democracy rests on a permanent morale achieved through building physical and psychological securities.

#### WHAT TO DO ABOUT IT

##### *Basic Propositions for Morale*

Certain basic premises underlie the building of a strong morale:

1. The American people have already committed themselves, their money, and their manpower to the war effort. They have provided for the physical defenses.
2. Democratic leadership in government is called for to provide the psychological defenses that will fill the need for psychological and physical security. The aim of our national morale is the maintenance of democracy and the defeat of Nazism and all it stands for.

The recommendations which follow depend on democratic methods to build a strong national morale, voluntary effort by the people, and effort by the government as representative of the people. The activities are democratic—persuasion, suggestion, and education, and above all, *truth*.

##### *Persuasion through Truth*

Rauschning comments that the Nazis have made the lie their ideal, have harnessed deeds and thoughts to the negation of all that is best in the world. Democracies, on the other hand, still place reliance on those standards through which we have realized our individual development and freedom. If we have faith in democracy, we shall continue on our proven paths, but we shall also enlarge our activities in order to strengthen the values in our way of life.

Faith in democracy can be strengthened by helping the people to understand both what it is and what it is not. Democracy is difficult to define. Both a way of life and a form of government, it is not static; it is dynamic and moving. Its very response to the needs of the times makes it difficult to define as one defines a rigid idea. Millions of Americans should be educated to become active, articulate, and dynamic focal points, mobilized as an undefeatable army to build up these psychological ramparts. Individuals can be taught to understand what democracy is and what it means to them, as well as what its absence would mean to them.

Voluntary citizen groups and the government can speak up for democracy, tell and teach. The crisis demands that ignorance and apathy be dealt with.

#### *Speak Up for Democracy*

Bringing the facts to the people so that they will have a true basis for their judgments is essential in a democracy. Today they are exposed to a competitive barrage of facts from many sources, near facts, and lies.

Voluntary groups already do speak up for democracy, on a national, statewide, and community basis. They define what it is, what it does, how it differs from other systems. They try to take up the slack, to counteract and counterattack subversive and other antidemocratic propaganda, and their work should continue and expand.

#### *The Need for a Broad Integrated Plan*

The time has arrived for the United States to undertake a consistent effort to carry on education in the meanings and importance of democracy to the American individual. There are dangers in such a program, dangers of regimentation, of peaceful infiltration by those who twist or distort democracy to whatever meaning they may want to give it. But against those dangers are the greater dangers of apathy and ignorance, of myopia, of misguided zeal, which in a crisis situation may lead to national disaster. It is time for the government, as such, to weigh the risks of centralized public information versus haphazard public information and to decide on the former.

This is not an easy task, because a democracy represents

different meanings to different people. It may be questioned whether the government as such can explain what our democracy is and what it is not. But the government already functions in this field. It does it in the schools, through elementary and high-school and even public college education. It does it when the Chief Executive makes a pronouncement.

What is needed is one centralized authority that gives out facts, that correlates and coördinates the activities of the many scattered information agencies. There is, of course, some coöperation today between these departments. The Office of Facts and Figures is closest to being such an organization. But no matter how good its intentions, unless there is centralization with specific authority, consciously or unconsciously, some of the groups engaged in the activity will be competing with their fellows for the attention, interest, and action of the public. Practically every branch of the national government has its Department of Public Information and there are, of course, superbodies. All at the present time are decentralized.

In the previous war George Creel, authoritative head of the Committee of Public Information, did such a job of coöordination and made remarkably few mistakes in the selection of his staff, even though there were few men of training and experience available for use at the time. As Creel himself points out, "All that offered were authors, newspaper men, advertising men and college professors." Today, of course, that situation does not hold. Since the last war technicians in all the fields of communications and in the social sciences have been developed and offer a reservoir of resources from which to draw.

There is no basic plan, no underlying concept that governs the various agencies today. There has been no implementation of what the President has laid down as policy. No single organization develops an approach which the others follow as part of a whole. Overlapping, duplicating, and conflicting facts and points of view reach the public, which is left as puzzled as it was in the recent gasoline-scarcity controversy.

The government organization to carry on such activity should correspond in its informational aspect to the Committee on Public Information of the last war. But it should not be a censorship organization. It should be headed by a technician in mass communications. Its sole function should be to do one thing on a centralized basis: Present truthful material that

would enlighten the public about democracy and its present status. Such an organization should supply fact and definition to the people. It would thus provide an effective way to strengthen morale.

#### *Make Democracy Work Better*

The second recommendation is to make democracy work better. Democracy is not a finished product. We know that. There are still millions to whom it is not an actuality. More than definition is needed to make the alternative we present appear true. We have an obligation to strengthen democracy, to make it work better, so that the morale we desire to build may rest on a firm foundation of economic and psychological security. This can be done through democratic means, by voluntary and governmental groups working toward it.

Of voluntary groups, there are today thousands functioning in many fields on a national, state, and community basis. The Public Administration Year Book lists many of them—in education, child hygiene, housing, etc. Many of their activities overlap and duplicate themselves. Many are inefficient.

As an example of how aimless and uncoordinated the efforts of these groups are today, let us take the group of voluntary health-education organizations working for better health of the people. Chaotic competitive situations rule. If all the time, money, and effort, much of which is so badly misspent, were properly used in a unified public-health education movement aimed at solving our health-education problems, thousands upon thousands of illnesses and physical defects would be prevented in this country yearly. There is competition between good causes, not to mention direct jealousies and antagonism between good causes and good causes.

This obviously is true of other things as well as of health education. In every field the mushroomlike growth of efforts to strengthen our way of life requires reappraisal in the light of today's crisis.

#### *Nondemocratic Lags*

Our national government, state, and other political subdivisions, of course, are trying to strengthen democracy through laws furthering psychological and economic security. But

government itself is only an abstraction. We fail to think of it in terms of men and what they do, of departments and bureaus and commissions. These men, these agencies can give us democratic leadership which will exert itself wherever possible to ensure that democratic principles and practices shall prevail. Recent discrimination in employment in the war-materials product industries and against Negroes in the army and navy are cases in point. It is the obligation of democratic leadership to take up such nondemocratic lags.

#### *Problems of Morale in World War I*

Government acceptance by the people depends, too, on the actions of officials, elected or appointed, and how policies are carried out so that they are both democratic and efficient. That leads to our third recommendation: An activity aimed at harnessing the intellectual resources of the nation for a psychological general staff to be helpful with advice and counsel to make the government, in this time of crisis, more democratic and efficient.

In the last war, George Creel attempted to do that. In his own words: "It was just as though the Babylonians had been asked to build a threshing machine. Moreover, speed was the essence, and not only did an organization have to be built up overnight, but in the face of bitter and continuous attack. Of course, we had no chart, for at that time psychology was just a word and public relations counselors were unknown."

We know that in a democracy the consent of the people depends upon their desire to be led. But that in turn depends on the quality of the leadership. Today a leader needs to be proficient not only in mass communications but in a knowledge of those whom he is leading. The complexities of our background, the highly competitive interests in the conflict of ideas struggling for the attention of the public, demand a scientific approach toward leadership. It is not enough to be a naturally gifted leader. In the last fifty years the social sciences and experience have provided us with intellectual resources to implement leadership. There is among experts in this country a vast store of knowledge of what men do, what their motives are, their desires, their imagined and real grievances, their prejudices and taboos, the elements that strengthen morale, those

that weaken it. And there is still much to be learned. There are today experienced, skilled individuals, many of them already engaged in one or another branch of government, who could be appointed to such a national psychological general staff.

In the *Infantry Journal* of May, 1941, I stated that the government needs a psychological general staff to advise on all major questions of morale—in industry, civilian life, army, and navy. I envisage such a staff as providing the soundest available knowledge for building morale and for psychological warfare, and having on tap the ablest technicians, speeding up the entire morale-building process. Such a commission, carefully chosen by the government, could take its place in its field of psychological defense on a parity with the General Staff in physical defense.

#### *The Need for a Master Plan*

Much good work is now being done in this field by the public-relations divisions of many government departments—army, navy, and the others—but according to informed observers of the Washington scene, *there is no master plan* worked out by technicians drawn from the fields of the social sciences, sociology, psychology, ethnology, adult education, economics, the army, navy, public opinion, communications, public relations.

Technicians and experts in the physical sciences already advise the government on many subjects, and similarly, advantage might be taken of expert knowledge in the non-physical fields. There ought to be a master plan of psychological approaches just as there is a master plan for physical defenses. A psychological general staff would advise on methods and procedures to meet the national goals that have been set up by the government. It would be, essentially, not a policy-making agency, but an advisory body helping to translate policy into practice efficiently and democratically. Many governmental and private bureaus are carrying on activities to build morale. A group of experts working closely with the formulators and executors of our national policy might coördinate all these morale activities by giving them a broad orientation. This would give the important over-all psychological situation the same kind of attention the General Staff gives to planning to achieve military objectives. It is important that this organiza-

tion should not be a propaganda bureau nor a publicity bureau. It is a planning, strategy, and advisory body, with no authority except that which is inherent in good advice.

### *Laissez-Faire Is Costly*

We cannot afford to adopt a laissez-faire attitude toward the problem of maintaining and strengthening morale. Only by attacking the whole problem in this broad, integrated way can we ensure that our psychological ramparts shall grow in keeping with our physical ones. Only in this way can we ensure that the doubts and indecisions of some of us will be dissipated.

More than a year ago I called a meeting of sociologists, publicists, and social psychologists in New York to consider the subject. I quote from the statement we signed at the meeting. The need is even more urgent today.

"A sound American morale cannot be built on a mere defense of traditional American rights, or on heresy-hunting, a suppression of dissent or on the hatred of a common enemy. It must rest upon a positive program. Such a program must conceive Democracy in terms of increasing satisfaction of the needs of all our citizens. The building of American morale requires the systematic extension of economic and psychological security, and of mass participation in the formation of public policy. It requires the assurance that all the people shall enjoy the right to work and to grow, which is the basic premise of democracy.

"Many groups and agencies are aware of this problem and are already contributing to its solution. But they are in need of a more comprehensive, systematic and unified endeavor. The achievement of a high morale, like military preparation, takes time. It is imperative that this preparation begin at once. But to achieve a sound American morale is to do more than meet a temporary emergency. It is to lay the foundation of a vigorous and developing national life for the years to come."

### OUR REASONS FOR UNIFIED ACTION

#### *The Background of the Situation*

There are many reasons why we cannot permit matters to rest as they are, and why we should think of morale building as a continuous process now. If we examine the background of the

present situation in the United States we can understand the need for not permitting ourselves to be lulled into inaction by the magnificent demonstration of unity after Pearl Harbor.

Consider first of all our population. We are not homogeneous. We differ as to culture, religion, race, economic status, political party, educational background, and in many other ways. The last available census figures indicate that approximately  $11\frac{1}{2}$  per cent of the population of Americans are foreign-born and that 21 per cent are Americans born of one or two foreign-born parents;  $32\frac{1}{2}$  per cent are of foreign birth or are the children of foreign-born parents.

Under the stress of recent years, there has been intensification of the tribal or group feeling, an identification of the individual with his own group. Cleavages that in times of calm did not exist arose, and the population has lately presented, instead of a united front, a patchwork of different cultural, economic, geographic, racial, and religious patterns, with different goals, leaders, and interests. Dissipated for the time being, we want to ensure that these divisions shall not rise again to plague us.

We cannot permit emotional reactions to hate or fear, induced by psychological and economic insecurity, to affect our decisions concerning national policy in our internal and external relations. We recently made a study of voters before an election to determine what the basis for their choice of candidates was. The voters, it was found, fell into groups determined by religious, racial, economic, or other backgrounds. Their choice of candidates was prompted, not by the real issues of the campaign, but on a basis of emotion—hate or fear. Morale building can help to prevent this.

#### *Escapism and Isolationism*

In our adherence even in wartime to what psychologists call the "pleasure principle," and in our aversion to facing reality, many of us, in the present situation, still seek escape. Escapism is responsible, certainly, for some of the attitudes which made for isolationist movements before the war. National escapism has helped to produce, too, a passive attitude in the presence of dangers. In order not to face realities, we are willing to tell ourselves that Hitler's actions are actions that will not touch us.

This national escapism finds its outlet, too, in concentration on the "pleasure principle." Sports contests have much pulling power. The public is still preoccupied with Greta Garbo and whether double or single features should rule in the movie houses. These energies could effectively be turned to the pursuit of more realistic goals. Again morale building may help.

#### *Insecurities—Psychological and Economic*

America has had a great depression, which brought with it psychological and economic insecurity. Many of the idea values we accepted have been destroyed in the last decade. In our youth no one could have imagined the realities of evil we face today. We have not been prepared by our education or experience to face them. Democracy was a great living ideal in our youth—not yet fulfilled, but attainable. Today there is in existence a strong regimented system of life, Nazism, which appeals to some persons with a passion for order. There are illusions, too, that further psychological insecurity: a large part of the population, particularly youth, see the world they have been born into as not having the values they are now urged to accept. Psychological insecurity has been accelerated, hastened, spread over wide areas by economic insecurity brought on by the depression. And these attitudes have been exploited by all those propagandists and special pleaders who want to divide democracy, who want to array class against class, group against group.

The "invasion from Mars," put on the radio by Orson Welles a few years ago, illustrated to what extent this psychological insecurity had made large segments of the American population believe in even the most unrealistic illusions.

There is statistical as well as visible evidence of economic insecurity. Our income figures and other quantitative yardsticks show that millions of Americans have reason to worry about their future security, old age, sickness, and unemployment. With such psychological and economic insecurity, there is in the United States a background situation for lack of a strong morale.

#### *Psychological Warfare*

Another reason for the need for building morale is the psychological warfare directed at America by the Nazis. The

Germans, using ideas as weapons, have developed a science of psychological warfare—research, fact finding, analysis, positive and negative factors in stimulating civilian morale, strategy, and tactics, fields of activities like national psychology, weapons of psychological warfare, propaganda, press, leaflets, films, geopolitics, radio, fifth column. We see astute Machiavellian propaganda techniques aimed against this country in the same way in which they have been so successfully employed against other countries. We are subjected to propaganda capitalizing on traditional prejudices, inequalities, jealousies, implemented in certain cases by threat, terror, and intimidations.

Internal antidemocratic propaganda does not appear on the surface today. But antialien, antilabor, appeaser, "super-patriotic," and anti-civil-liberty propagandas are only quiescent. If it had not been for the basic adherence to the traditional faiths of America, we should have been sold down the river long ago.

The strength of the Nazi machine has had an effect upon our national morale. We are worshippers of power and certainly, in this scientific age, of efficiency. The sweep of the Nazi blitzkrieg has undoubtedly had its effect in creating situations where a weak devotion to democratic goals and ideals was further weakened.

#### *Democracy Taken for Granted*

We must not forget, too, that our public education has not stressed democratic loyalties and a knowledge of democracy as much as it might have. Our school system, our most effective means of social control, has not grown up to meet a crisis situation.

The uphill fight for free education developed on an evolutionary basis, without advance planning. Crises jolted the public education system into meeting them. The cultural time lag in the schools has not prepared our present generation for grasping the realities involved in what Hamilton Fish Armstrong calls "we or they," a clear-cut understanding of two ways of life. Like health, which we take for granted because there is no sensory perception of it as there is of illness, we take our democracy and our democratic education for granted. Unless we feel the impact of the tyrant, it all seems remote and far away. Our sense of realism is jolted into action only when a crisis demands it.

*Our Policy of Noninterference*

There is yet another point. This stems from the postwar cynicism that brought with it the rejection of the Versailles Treaty, the "back to normalcy" of the Harding period, the thought expressed in "I didn't raise my boy to be a soldier," and in the anti-armament movement of the twenties, the Nye investigations of war-armament manufactures, and the Oxford oath. The emphasis in the last generation has been placed on peace and on not interfering in Europe. It is this underlying factor in the attitudes of millions that helped to keep alive the America First Committee, the isolationist point of view. This cynicism has now been shelved, and morale-building efforts are needed to keep it from resurrection.

*The Engineering of Consent*

What has been called the engineering of consent in a democracy is a new concept. It presupposes a knowledge of the social sciences and an experience of working on an engineering approach with the leadership of public opinion in a democracy. I have defined it in this way: the engineering of consent in a democracy means that the chosen leader gains the consent of his followers to his program through truth—by education, persuasion, and suggestion, not through threat, intimidation, or brutality. This cannot be done on a haphazard basis. It is comparable to the way that a bridge is built by an engineer, or a military campaign is worked out by a military strategist or tactician.

Our chosen leaders believe mainly in the power of the word. The tradition that words that won the last war can win this one still holds. As a matter of fact, the tyranny of words has been greatly deflated in the last years. Words are the foci for other activities. Neither the leaders in this country nor those in England appear to recognize that this matter of indoctrination, of teaching, is a matter not of telling but of effective planning, strategy, and timing.

Our people are being called upon to make sacrifices—sacrifices of life, sacrifices in time, sacrifices in money, sacrifices of comfort—without really ever having been given a full understanding of why these sacrifices are called for, why they need to be made. A chaos of words and pictures appears before the pub-

lic through all channels of communication, overlapping, contradicting. What is needed is planning of activity, implementation, selling, action, on a front developed on a broad integrated basis which utilizes all methods and all forms of conveying ideas to men.

#### *Conflict and Cleavage*

A democratic people is made up of many groups. They reach equilibrium through conflict. Adjustment is sometimes peaceable, sometimes not so peaceable as it might be—as in the case of strikes and lockouts. In peacetime such conflict resolves itself. In crisis periods these conflicts are dangerous to the necessities of unified action. Simple, direct, quick decisions are difficult for a democracy to make. Many such conflicts go on in a democracy: capital versus labor, industry versus farming, large business versus small business, trade versus industry, farmer versus worker, producer of capital goods versus producer of consumer goods. Sometimes these conflicts reach a breaking point. Factions want to rule on the basis of their specific interests rather than to consider common interests and goals. There is a basic difficulty in continuing to maintain national morale unless factions see the rights and obligations of the other groups.

#### *Dominant Private Interests*

There is yet another point in morale building. That is the personal-power complex of individuals. Men want to retain their position in politics, industry, the professions. Undoubtedly the desire for private good rather than the common good was one of the factors that helped to defeat France, the desire of those of the ruling class to retain their personal privileges rather than their rights in the democracy. It is important in national morale that the personal angle be laid aside.

To achieve a continuously strong morale, we need physical and emotional well-being, a common goal, common leaders we can trust, and a belief in one another. A short study of our background situation shows us the necessity of planning the work on an organized basis if we are to maintain and strengthen our national morale.

## CIVIL LIBERTIES IN A PERIOD OF TRANSITION\*

David Riesman

IN the field of civil liberties, we are ill-prepared for crisis. We have been the proud but uncritical inheritors of a great liberal tradition, and liberals have been inclined on the whole neither to challenge the tradition nor to seek to adapt it to the radically new conditions which confront us. When critical issues arise—wire tapping,<sup>1</sup> freedom of assembly for anti-democratic groups,<sup>2</sup> organized anti-Semitic propaganda,<sup>3</sup> conscription, and other war measures—discussion does not rise above the level of inherited slogans, which are bandied about as if they could give answers to the problems. There has been little research and little intelligent debate either upon these issues or upon the more general framework of civil-liberty policy within which they might be encompassed. As compared, for example, to the scientific attention given in the three volumes of *Public Policy* to fiscal, commercial, and administrative matters, civil-liberty policy has been neglected, though it in-

\* This is the introduction to a series of studies on questions of civil liberties. Articles are in preparation on freedom of assembly, wire tapping, group libel [see "Democracy and Defamation: Control of Group Libel," (1942) 42 *Columbia Law Review* 727], and political defamation. I am indebted to the Law School of Columbia University, whose grant of a research fellowship has enabled me to pursue these inquiries.

<sup>1</sup> This is dramatically illustrated by the debate on wire tapping at the New York State Constitutional Convention of 1938. There was confusion of these separable questions: the practical desirability of wire tapping in specific cases, the legality of its admissibility in evidence, the enforceability of a proposed ban, and the theoretical invasions of freedom of speech. These debates are to be found in the *New York State Constitutional Convention, 1938, Revised Record*. For newspaper accounts of the discussions see *New York Times*, June 6, 1938, p. 5; June 15, 1938, p. 1; June 16, 1938, p. 2. For a description of the widespread use of wire tapping in spite of statutory and procedural prohibitions, see (1941) 9 *International Juridical Association Bulletin* 97.

<sup>2</sup> Cf., e.g., the variegated views indicated by the Council for Democracy's pamphlet, *Freedom of Assembly and Anti-Democratic Groups* (1941).

<sup>3</sup> Cf., for the failure of the New Jersey "race hatred" law, *State v. Klapprott*, 22 A. (2d) 877 (1941), commented on in (1942) 2 *Bill of Rights Review* 140. See "The Gillette Bill for Propaganda Exposure: Analysis of the Bill and Radio Discussion of the Problem," Institute of Living Law, Report No. 2 (1941). But compare the thoughtful article of Irving Wilner, "The Civil Liability Aspects of Defamation Directed Against a Collectivity," (1942) 90 *University of Pennsylvania Law Review* 414.

volves not only the delicate intangibles of speech and thought but the formation of that public opinion on which all policies in all fields ultimately turn.

For the past hundred and fifty years, civil-liberty policy has largely concentrated upon the negative issue of defining acceptable limits beyond which government should not go in "interfering" with individual behavior. Likewise there has been much discussion of methods of enforcing the policy of governmental restraint. Of late years, attention has begun to turn to the more positive issue: the use of governmental and private power to educate people for civil liberty and to prepare the social conditions for it. In this paper, I shall turn first to the negative issue: to the tests which have been put forward to limit, or to justify, legislative restriction of the scope of civil liberties. Then I shall try to explain the historical reasons for the present style of thinking in the United States as crystallized in these various tests, and to outline the historical changes which have rendered that style of thinking obsolete. In conclusion, I shall suggest a tentative method of harmonizing negative and positive approaches to governmental action in the field of civil liberties. These approaches need not be mutually exclusive. In a time of crisis—and the concept of "crisis" I shall try to redefine as it applies to this field—both are necessary.

#### TESTING THE LIMITS OF CIVIL LIBERTY

The formulae in which the limits of civil liberty have been expressed in the past naturally relate mainly to those liberties that are the outgrowth of tradition: freedom of speech, press, and assembly. While the all-important "clear and present danger" test was developed through constitutional litigation, certain other tests, such as the distinction between liberty and license or between education and propaganda, rest largely upon generalizations which are moral or political. I shall discuss them briefly.

The distinction often made between "liberty" and "license" is actually so general as to be meaningless in application: liberty is what one approves of and license what one does not approve of. Where license is given the connotation of "licentiousness," the distinction is a way of phrasing puritanical attitudes toward sexual writing or behavior. Many liberals, either because their

liberalism stems from a Puritan background, or because of the strategic difficulty of opposing church doctrines, try to draw a line at licentiousness or obscenity, and make no defense of civil liberties beyond that line. The courts have also gone a long way toward permitting legislatures to write these doctrines into law, in the censorship of the arts and of private life.<sup>4</sup> On the other hand, a number of noted liberals, such as Morris Ernst and Arthur Garfield Hays, have maintained a consistent position in this area and have fought for their belief that the dangers of legislative repression of "obscenity" are greater than the highly speculative dangers that complete freedom of expression might entail.<sup>5</sup> But neither libertarians nor Puritans have attempted to shape a public policy on the basis of an investigation of the social-psychological effects, if any, of commercially promoted pornography, and of the methods and effects of attempting to suppress it.<sup>6</sup> Hence, we are thrown back on slogans, prejudice, and guesswork. But the issue is of diminishing importance as politics replaces sex as the "opiate of the masses" and as the chief battleground of censorship.

The dichotomy between "education" and "propaganda" is sometimes put forward as a test for governmental policy in the field of speech and the press. In the popular view, propaganda should be banned, or at the very least exposed: it is a bad thing;

<sup>4</sup> See *Caminetti v. United States*, 242 U. S. 470 (1916) (White Slave Traffic Act applies to interstate transportation for fornication although no money is involved). With *Mutual Film Co. v. Industrial Commission of Ohio*, 236 U. S. 230 (1914), permitting prior censorship of movies [see (1939) 39 *Columbia Law Review* 1383], compare *Near v. Minnesota*, 283 U. S. 697 (1930), [(1931) 31 *Columbia Law Review* 1148], holding unconstitutional, as prior censorship, a law providing for the issuance of injunctions against "malicious, scandalous and defamatory" matter.

For critical legal analysis, see Zechariah Chafee, "Censorship of Plays and Books," (1940) 1 *Bill of Rights Review* 16-23, and "Comments on Book-Censorship Juries," (1941) *ibid.*, 164-165.

For discussion and review of important obscenity cases, see Morris L. Ernst and Alexander Lindey, *The Censor Marches On; Recent Milestones in the Administration of the Obscenity Law in the United States* (1940), especially Appendix A, pp. 273-305; Theodore A. Schroeder, *A Challenge to Sex Censors* (1938), especially pp. 94-105. See also Alec Craig, *The Banned Books of England* (1937). The English Cockburn test depends on "those whose minds are open to . . . immoral influences." Cf. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (1933), where Judge Woolsey adopted the French test *homme moyen sensuel*: that which suggests impure and libidinous thoughts to a normal person.

<sup>5</sup> See Morris L. Ernst and William Seagle, *To the Pure* (1928); Arthur Garfield Hays, *Let Freedom Ring* (1928), pp. 274-275: "In this, as in other lines, I should chance the dangers of freedom, with confidence that knowledge is safer than ignorance."

<sup>6</sup> See Lewis Dexter, "Civil Liberties in a Twentieth Century World," in *Censorship in Time of Crisis* (Civil Liberties Committee of Massachusetts, 1941).

education is to be promoted: it is good.<sup>7</sup> This is as subjective as the distinction between liberty and license, for it dubs as "propaganda" every opinion or fact that is disliked. As a reaction, the scholarly definitions of propaganda often include every symbol which is intended to induce to action,<sup>8</sup> and the techniques of symbol classification and propaganda analysis seek with an unattainable and undesirable detachment to lay bare the objectives aimed at without conscious exploration of their social value. This is too undiscriminating to be useful; it is obviously necessary to make a socially relevant and manageable selection of what is to be analyzed. Certainly propaganda analysis is not useful as a test for limiting freedom of expression, since it is not contended that it is desirable to suppress all propaganda as so inclusively defined, even if it were possible to do so.

#### THE PREVAILING FORMULA: CLEAR AND PRESENT DANGER

The "clear and present danger" test has genuine importance. It is the chief distillate of recent liberal thinking on the negative issue, and today it, or its paraphrases, are utilized as the constitutional limits of legislation in the field of civil liberties. The test emerged from the cases in the Supreme Court dealing with the Espionage Acts of 1917 and 1918.<sup>9</sup> These Acts placed

<sup>7</sup> See Frederick E. Lumley, *The Propaganda Menace* (1933), pp. 14-20, 21-44, 301-329. See also Emory S. Bogardus, "Earmarks of Propaganda," *Sociology and Social Research*, vol. XXVI (1942), pp. 272-283 (propaganda calls for the closed mind, while education seeks to stimulate the open mind).

<sup>8</sup> See *The Fine Art of Propaganda* (Institute for Propaganda Analysis, 1939), p. 15: "Every expression of opinion or action by individuals or groups deliberately designed to influence opinions or actions of other individuals or groups with reference to predetermined ends." See also Harwood L. Childs, *An Introduction to Public Opinion* (1941), pp. 75-88, for criticism of the views of both Lumley and the Institute; Carl J. Friedrich, "Education and Propaganda," *Atlantic Monthly*, vol. 159 (June 1937), p. 693. Cf. John William Albig, *Public Opinion* (1939), pp. 284-286 (propaganda is intentional dissemination of conclusions from concealed sources by interested individuals and groups); and see also Max Lerner, "Propaganda in Our Time" in *Ideas for the Ice Age* (1941), pp. 184-190, reviewing Harold Lavine and James Wechsler, *War Propaganda in the United States* (Institute for Propaganda Analysis, 1940); Gregory Bateson and Margaret Mead, "Principles of Morale Building," *Journal of Educational Sociology*, vol. XV (December 1941), pp. 206, 213 *et seq.*

<sup>9</sup> Section 3 of the Espionage Act of 1917 punishes false statements with intent to interfere with the military success of the United States, cause insubordination in the military or naval forces, or obstruct recruiting. The 1918 amendment, sometimes called the Sedition Act, expanded the list of offenses to include doing or saying anything "disloyal" or "opposing the cause of the United States in the war." The amendment was repealed in 1921; the Act was left in force and becomes operative in time of war.

restrictions on expression of opinion that were challenged under the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." It is evident that if the Amendment were to be taken literally, on impairment whatever of speech or the press could stand.<sup>10</sup> Since the Alien and Sedition Acts of 1798, the question had slumbered.<sup>11</sup> Those Acts, generally thought of as unconstitutional, were nullified by Jefferson in 1801 by pardons for the persons convicted under them. But during and immediately following the World War of 1917-1918, it became politically almost impossible to contend that Congress could place no limitations whatever on freedom of speech and the press. As Professor Chafee wrote in 1920: "the agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock."<sup>12</sup> Jurists and scholars who were concerned with both objectives—the efficient prosecution of the war and the preservation of a maximum of free discussion—sought to draw a sensible line between them. District Judge Learned Hand, in the *Masses* case, took the position that only words which incited to crime could be forbidden constitutionally.<sup>13</sup> But his bold view was not accepted, and in the *Schenck* case the Supreme Court, in sustaining convictions under the Espionage Act of 1917, asserted: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men

<sup>10</sup> The Alien Law provided for deportation of aliens deemed dangerous to the safety of the United States, while the Sedition Law punished false or malicious writing published with intent to stir up sedition. For a discussion of these, see Albert J. Beveridge, *The Life of John Marshall* (1916), vol. II, pp. 361, 381 *et seq.*, and Claude G. Bowers, *Jefferson and Hamilton: The Struggle for Democracy in America* (1933), pp. 374-380.

<sup>11</sup> *Freedom of Speech*, p. 34.

<sup>12</sup> *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S. D. N. Y., 1917), suit to enjoin the postmaster from excluding from the mails a publication which he deemed violated the Espionage Act. Relying on the criminal-law tests of solicitation and incitement (specific intent and reasonable expectation of success), Judge Hand granted the injunction. He was reversed by the Court of Appeals, which established the bad tendency test: ". . . if the natural and reasonable effect of what is said is to encourage resistance to law, and the words are used in an endeavor to persuade to resistance." 246 Fed. 24, 38 (C. C. A. 2d, 1917).

fight, and that no court could regard them as protected by any constitutional right."<sup>13</sup> This now venerable statement has become the authoritative proclamation of the clear and present danger test. Its often-remarked vicissitudes in the Supreme Court I shall touch on only briefly. Rather, I shall subject its several parts to ethical and political analysis.

Thus, according to the language of the *Schenck* case, speech can be suppressed which not too remotely and minimally endangers any important governmental policy. However, the governmental policy in the *Schenck* case was conscription, which, at least as to drafted men, had perhaps ceased to be debatable, and so the case, if confined to its facts, could be turned off upon that point. Yet even in wartime, the deadlock Professor Chafee speaks of presents a moral as well as a constitutional issue. It ought not be assumed that a particular governmental policy—even a war—is completely justifiable and deserves not to be nullified or hampered by verbal obstruction or even by arguments for its repeal. Holmes, the author of the *Schenck* opinion, was in sympathy with the war.<sup>14</sup> He therefore was inclined to see harm in actual obstruction that many Americans, both pacifists and nonpacifists, would not have recognized, since they thought the war unjust or ill-advised. To deprive objectors of the opportunity to urge an alteration of policy, simply because that policy would thereby be endangered, is to give away one's liberalism. The same holds true even when the "substantive evils" to be avoided by suppression are not threats to national security in wartime, but are a violent danger to the form of government itself. The clear and present danger test means in this connection, and particularly as developed in the postwar cases,<sup>15</sup> that only innocuous and aca-

<sup>13</sup> *Schenck v. United States*, 249 U. S. 47, 52 (1919). The defendants, officers of the Socialist party, were convicted for the distribution of leaflets which urged that conscription was unconstitutional under the Thirteenth Amendment (involuntary servitude) and a "monstrous wrong against humanity in the interest of Wall Street's chosen few." Some of the leaflets went through the mails to drafted men.

The opinion in the *Schenck* case borrows the terminology of the common-law rule in criminal incitement, the clear and present danger test succinctly rephrasing the concept that, to be punishable, incitement must come dangerously near success. See W. H. Hitchler, "Solicitations," (1937) 41 *Dickinson Law Review* 225, 227; Zechariah Chafee, "Freedom of Speech in War Time," (1919) 32 *Harvard Law Review* 932.

<sup>14</sup> See *Holmes-Pollock Letters*, edited by Mark de Wolfe Howe (1941), vol. I, pp. 219, 221, 223-224. Compare, however, vol. I, p. 67.

<sup>15</sup> *Whitney v. California*, 274 U. S. 357 (1927); *Gillow v. New York*, 268 U. S. 652 (1925); *Fiske v. Kansas*, 274 U. S. 380 (1927); and *Herndon v. Lowry*, 301 U. S. 242 (1937), all discussed below.

demic incitements to the overthrow of the existing government will not be labeled sedition. But the question of the value of free discussion as balanced against other social interests is one that cannot be resolved dogmatically. It might turn out, upon examination of a particular issue, that the value of military effectiveness which Holmes assumed as primary in the *Schenck* case, or even the value of peaceful as against violent governmental change, as in the later cases, are not so great as to require limitations on freedom of discussion.<sup>16</sup> A clear and present danger to some Congressionally determined "substantive evils," even serious ones, might then be worth risking for the sake of those values which freedom of discussion can appropriately serve.

When concerned with danger, the test neglects to weigh the values of what is endangered against the values of what is to be suppressed, and, most significantly, the evil of suppression itself as a qualitative act. On the other hand, when concerned with waiting for a danger to become clear and present, the test may enforce the risk of meeting it too late. Justice Holmes, whom Max Lerner has aptly characterized as a soldier and a gambler, was ready to accept these risks of waiting—except in some of the cases of direct interference with the soldier's task—because of his aristocratic gambler's detachment from the serious social issues of our time.<sup>17</sup> Moreover, he was a determinist, if not a defeatist, about social policy in general; he was as skeptical of legislation as of judicial interference with it.<sup>18</sup> Events have shown that he was right to scoff, as he did in the *Abrams*<sup>19</sup> case, at the American bogey of Bolshevism, but events have not shown that speech and writing, even those which begin as "puny anonymities," are incapable of promoting revolution. In *Near v. Minnesota*,<sup>20</sup> in which the result reached

<sup>16</sup> Cf. Mark de Wolfe Howe, Book Review, (1942) 53 *Harvard Law Review* 695.

<sup>17</sup> See Max Lerner, "Justice Holmes: Flowering and Defeat," in *Ideas Are Weapons* (1939), pp. 54-58. See also *Holmes-Pollock Letters*, *op. cit.*, vol. I, pp. 86, 87-88, vol. II, p. 252.

<sup>18</sup> *Holmes-Pollock Letters*, *op. cit.*, vol. I, pp. 118, 152, 199, 201, vol. II, pp. 110-111, 158, 163, 230, 251-252. But see *United States v. Schwimmer*, 279 U. S. 644 (1928), and *United States v. McIntosh*, 283 U. S. 605 (1931), in which Holmes dissented when the Court refused naturalization to persons who would not promise to bear arms because of pacifism or religious beliefs.

<sup>19</sup> *Abrams v. United States*, 250 U. S. 616 (1919).

<sup>20</sup> 283 U. S. 697 (1931). George Foster, Jr., "The 1931 Personal Liberties Cases," *Selected Essays on Constitutional Law*, edited by a Committee of Association of American Law Schools (1938), Book II, pp. 1080, 1082-1087.

may be defensible, the liberals on the Court read into the Constitution a prohibition against preventive censorship of a scurrilous periodical, compelling reliance on the common law of libel. But the job of wise statesmanship would seem to be to eliminate unnecessary gambles in the realm of public policy; in government, as in medicine or law, progress in the art is measured by the extent to which preventive measures are adopted before the point is reached at which only curative remedies are left.

These objections to the formula of the *Schenck* case have not prevented its wide acceptance. "When the small group of courageous men who fought these [wartime] prosecutions in the courts gave up the extreme position that speech was never punishable unless it was shown to have actually resulted in inciting criminal acts, they seized upon Justice Holmes' formula for their next stand; and in the cases that have arisen since, the most persistent contention made in attacking limitations of freedom of speech and assembly has been couched in terms of the clear and present danger test."<sup>21</sup> Despite this persistent advocacy, however, the Court has not accepted the test in all cases, and it has not applied it in any predictable way. Even the series of war cases is inconsistent, although in all of them the danger, if any there was, was a present one: the defendants wanted to hamper the war effort, although they may have had their eyes on more remote and revolutionary goals as well. In the *Abrams* case, Holmes and Brandeis, dissenting, saw in the defendants' conduct no "present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion. . . ."<sup>22</sup> So, too, the Court

<sup>21</sup> Herbert Wechsler in (1941) 9 *American Law School Review* 881, 882 (a notable brief summary). See also Zechariah Chafee, *Free Speech in the United States* (1941); Osmond K. Fraenkel, "One Hundred and Fifty Years of the Bill of Rights," (1939) 23 *Minnesota Law Review* 719, with supplement, American Civil Liberties Union (1941); William B. Murrish, "Protection of Free Speech under the Federal Constitution," (1940) 28 *California Law Review* 733; Edwin M. Borchard, "Supreme Court and Private Rights," (1938) 47 *Yale Law Journal* 1051-78; Herbert F. Goodrich, "Does the Constitution Protect Free Speech?" (1921) 19 *Michigan Law Review* 487; Forrest Revere Black, "Debs v. United States: A Judicial Milepost on the Road to Absolutism," (1932) 81 *University of Pennsylvania Law Review* 160.

<sup>22</sup> 250 U. S. 616, 628 (1919). For writings denouncing intervention in Russia, the five defendants were convicted on charges of urging curtailment of production with intent to hinder the United States in the prosecution of the war with Germany, and were sentenced to twenty years in jail.

On Holmes's requirement of specific intent, see Zechariah Chafee, *Free Speech in the United States* (1941), pp. 129-135, also Chafee "Freedom of Speech in War

divided in the *Schaeffer* and *Pierce* cases.<sup>23</sup> But in several other decisions, the Court agreed in the repression of conduct that in retrospect seems quite as far removed from endangering the prosecution of the war as was the conduct in the *Abrams* case itself.<sup>24</sup> Thus, even where the issue was confined to the question of whether the danger was clear, the formula proved unilluminating.

In the postwar *Gitlow* case, the writing for which the defendant was convicted was not directed at an immediate objective, such as opposition to the draft or the war effort as a whole, but at the more distant aims of revolutionary socialism.<sup>25</sup> Over the dissenters' insistence that the clear and present danger

Time," (1919) 32 *Harvard Law Review* 932, 949-973; Herbert Wechsler in (1941) 9 *American Law School Review* 881, 882.

<sup>23</sup> *Schaeffer v. United States*, 251 U. S. 468 (1920) (publication of slighting references to our war strength and falsifications which consisted of slight additions to and omissions from news reports); *Pierce v. United States*, 252 U. S. 239 (1920) (publications were Socialist literature which were generally circulated). See also *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921) (the Postmaster General was permitted to revoke a second-class permit of the *Milwaukee Leader* because of its opposition to the participation of the United States in the war); *Gilbert v. Minnesota*, 254 U. S. 325 (1920) (a speaker was convicted under a state sedition law for criticising the working of democracy in this country).

<sup>24</sup> *Frohwerk v. United States*, 249 U. S. 204 (1919); *Debs v. United States*, 249 U. S. 211 (1919). In the *Frohwerk* case (249 U. S. at 209), the publications were circulated generally, unlike the articles in the *Schenck* case, which were mailed to men who had already been passed by draft boards. The opinion by Justice Holmes foreshadows the majority opinion in the later *Abrams* case in saying, "of that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied on by those who sent that paper out." In the *Debs* case the "dangerous utterances" were an exposition of the Socialist platform, including a condemnation of war as a defect in our social system, before a Socialist audience.

<sup>25</sup> The postwar cases are concerned largely with convictions under criminal syndicalism laws adopted between 1917 and 1920 by about one third of the states. Criminal syndicalism, as defined, consists of any doctrine advocating the commission of crime, sabotage, or acts of force or violence as a means of accomplishing a change in industrial ownership or control or any political change. In *Gitlow v. New York*, 268 U. S. 652 (1925), Gitlow had published a thirty-four-page manifesto urging the dictatorship of the proletariat. Holmes and Brandeis dissented here (268 U. S. at 673), saying that "whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration." See also *Whitney v. California*, 274 U. S. 357 (1927), where conviction under a similar law was obtained on evidence that the defendant attended a convention of the Communist party which adopted the manifesto. Cf. *Fiske v. Kansas*, 274 U. S. 380 (1927), holding that the I. W. W. literature depended upon for conviction did not come within the limits of the statute. Compare this with *Burns v. United States*, 274 U. S. 328 (1927) (conviction as an I. W. W. organizer under a similar statute).

For a recent discussion of these laws, see James Lipsig, *Sedition, Criminal Syndicalism, and Criminal Anarchy Laws* (American Civil Liberties Union, April 1939).

test was the authoritative guide, the majority of the Court rejected it. It argued that the legislature need not wait until danger is imminent, but may "suppress the threatened danger in its incipiency." This approach was abandoned in the *Herndon* case, and the temporal element was restored to the clear and present danger test. There the Court majority found that the Communist revolution advocated by the defendant was to occur at too remote and incalculable a future time to justify legislative suppression of agitation for it.<sup>26</sup>

In recent cases, the Court, while purporting to apply the test, has made it plain that it will not stop its inquiry with even an actual and present danger, where that danger is counterbalanced by the social advantages of the conduct for which repression is sought. In the picketing cases, the Court weighed the values of organizing workingmen against the dangers to internal order and employers' property rights.<sup>27</sup> It found the dangers worth risking because "in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution."<sup>28</sup> In the leaflet<sup>29</sup> and meeting<sup>30</sup> cases, the values of free discussion were

<sup>26</sup> *Herndon v. Lowry*, 301 U. S. 242 (1937). Herndon, a Communist organizer, was convicted under an old Georgia insurrection law punishing by death any attempt to induce others to combined resistance to the state. The trial court in the first case [see *Herndon v. Georgia*, 179 Ga. 597 (1934), *aff'd*, 295 U. S. 441 (1935)] held that immediate resistance was contemplated by the statute, but also found membership blanks and other Communist literature sufficient. The Appellate State Court held that the statute must be construed to contemplate resistance within a reasonable time and sustained the conviction on the evidence.

<sup>27</sup> See *Thornhill v. Alabama*, 310 U. S. 88 (1940); *American Federation of Labor v. Swing*, 312 U. S. 321 (1941). But compare *Milk Wagon Drivers Union v. Meadowmoor*, 312 U. S. 287 (1941), where the Court sustained an injunction against picketing because of past acts of violence.

<sup>28</sup> *Thornhill v. Alabama*, 310 U. S. at 102.

<sup>29</sup> *Lovell v. City of Griffin*, 303 U. S. 444 (1938) (freedom of speech held to include distribution of leaflets). This was extended to include the right to distribute leaflets on the public streets, in spite of the declared legislative purpose of keeping the streets clean, in *Schneider v. State (Town of Irvington)*, 308 U. S. 147 (1940), together with *Young v. California*, *id.*, 154 (leaflets announced meeting of friends of the Lincoln Brigade); *Snyder v. Milwaukee*, *id.*, 155 (leaflets distributed by pickets in a labor dispute); *Nichols et al. v. Massachusetts*, *id.*, 156 (leaflets described a meeting to voice grievances concerning the administration of the state employment insurance system).

<sup>30</sup> *De Jonge v. Oregon*, 299 U. S. 353 (1937) (mere participation in a Communist Party meeting held not to sustain criminal-syndicalism charge); *Hague v. C. I. O.*, 307 U. S. 496 (1939) (invalidating a city ordinance which required a permit for a public assembly, although the permit could be withheld by the Director of Public Safety only for the purpose of "preventing riots, disturbances, or disorderly assemblage"). For a full discussion of this case see Zechariah Chafee, *Free Speech in the United States* (1941), pp. 409-435, and the bibliography.

similarly found to prevail despite the danger of littered streets or the difficulties of policing. And proselytizing of Jehovah's Witnesses was permitted despite the outrage to Catholic sensibilities and the consequent danger of attacks on the Witnesses themselves.<sup>31</sup> In the flag-salute case, also involving the Witnesses, the alleged danger was to the national unity, which the Court found "an interest inferior to none in the hierarchy of legal values."<sup>32</sup> The competing interest—freedom to refuse obeisance, on religious grounds, to symbols of state power—was held of lesser value. This case has been widely criticized. Its critics have not always distinguished between the Court's method of approach, its balancing of values in the light of all the circumstances, which is a definite improvement over earlier mechanical applications of the clear and present danger test, and the actual judgment rendered, which overvalues the patriotic ritual as a means to unity.<sup>33</sup>

In the *Bridges* and *Times-Mirror* cases,<sup>34</sup> involving contempt by publication, the Court majority again explicitly accepted the clear and present danger test as controlling. But there, as in the other recent decisions, the Court takes into account, in addition to the nearness of the danger, the various factors, including the value of the interests threatened, which an intelligent legislator or administrator would also consider in

<sup>31</sup> See *Cantwell v. Connecticut*, 310 U. S. 296 (1940) (conviction for breach of peace reversed in spite of the fact that the defendant members of the Jehovah Witness sect had been playing a phonograph record attacking the Catholic Church on a street inhabited mainly by Catholics and that the history [see *Persecution of Jehovah's Witnesses* (American Civil Liberties Union, 1939)] of the treatment of that sect at the hands of the community at large is replete with acts of violence. Compare *State v. Chaplinsky*, 18 Atl. (2d) 754 (1941), *aff'd*, 62 Sup. Ct. 766 (1942); (1941) 1 *Bill of Rights Review* 310.

<sup>32</sup> *Minersville School District v. Gobitis*, 310 U. S. 586, 595 (1940) (two children of members of Jehovah's Witnesses were expelled from school for refusing to salute the flag as required by a school regulation). For difficulties raised by the principal case, see *State v. Lefever*, 20 Atl. (2d) 185 (1941); in the matter of Anson Reed, 28 N. Y. Sup. (2d) 92 (1941) 4th Department; *Commonwealth v. Johnson*, 35 N. E. (2d) 801 (1941).

<sup>33</sup> William G. Fennell, "The Reconstructed Court and Religious Freedom: The Gobitis Case in Retrospect," (1941) 19 *New York University Law Quarterly Review* 31, 38-40; "The Gobitis Case in Retrospect," (1941) 1 *Bill of Rights Review* 267; Robert E. Cushman, "Constitutional Law, 1939-40," *American Political Science Review*, vol. XXXV (1941), pp. 250, 269; (1940) 39 *Michigan Law Review* 149.

On the flag salute as a patriotic ritual, see Carl J. Friedrich, *Constitutional Government and Democracy* (1941), pp. 165-167.

<sup>34</sup> *Bridges v. State of California*, *Times-Mirror Co. et al. v. Superior Court of State of California, in and for Los Angeles County*, 62 Sup. Ct. 190 (1941), reversing the citation for contempt of both *Bridges* and the *Times-Mirror* for published comments pertaining to pending litigations.

determining whether to adopt a measure of repression. The formula of clear and present danger may help the Court to disguise this essentially legislative and administrative task of social judgment under words that appear more precise than they actually are, but there is always the risk that the Court, fooled by its own vocabulary or under its protection, may narrow the range of inquiry that is required if it is to assist the legislatures in framing an intelligent public policy.<sup>35</sup>

Still, the test may retain a certain propagandistic value for liberals who seek to hamper restrictive action in the realm of civil liberties by officials they distrust. They can occasionally embarrass them by asking for judicially competent evidence of "clear and present danger." But the syndicalism cases show that the Court will hesitate to substitute its judgment for that of the legislature where the latter has declared a specific doctrine dangerous, especially if the declaration can be backed by any sort of legislative findings. The flag-salute case likewise shows a large amount of deference to a legislature's value judgment. It seems vain to hope, as does Professor Chafee, that the rule of the *Schenck* case "now serves as a guiding principle for the future, and ought to make impossible hereafter a repetition of the worst decisions of the trial courts under the Espionage Act of 1917."<sup>36</sup> Beyond litigious strategy, the test may operate

<sup>35</sup> In this connection "presumption of constitutionality" of the legislative determination is also a penetrable disguise. It is invoked to rationalize a desirable result or to avoid the necessity of a judicial judgment on the statute in question and is ignored or rejected when the statute does not meet with judicial approval. In the *Gobitis* case, the Court recognized the need for a judicial balancing of values, but, on the ground of the presumption, abdicated its duty to review the legislative judgment. Cf. Justice Stone dissenting (310 U. S. at 606): "This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will." See also the comment in the *Bridges* case, 62 Sup. Ct. at 192 (1941), on the lack of direction by the legislature of California. Compare the statement in *Schneider v. State*, 308 U. S. at 161: "Where legislative abridgment of rights is asserted the courts must be astute to examine the effects of the challenged legislation . . . and so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of rights."

For a more complete discussion of the presumption of constitutionality, see (1931) 31 *Columbia Law Review* 1136; (1936) 36 *Columbia Law Review* 283. For particular reference to the presumption in cases involving civil liberties, see *United States v. Carolene Products Co.*, 304 U. S. 144 (1938) n. 4 at 152-153; (1940) 40 *Columbia Law Review* 531; (1940) 40 *Columbia Law Review* 1067. See also Edwin F. Albertsworth, "The New Constitutionalism," (1940) 26 *American Bar Association Journal* 865; Morris R. Cohen, "Constitutional and Natural Rights in 1789 and Since," (1938) 2 *National Lawyers Guild Quarterly* 92-103.

<sup>36</sup> Chafee, *Free Speech in the United States*, *op. cit.*, p. 86.

as a sort of general cautionary mandate which can be appealed to in the press and in debate. As such, it may help to puncture the recurrent Red scares. But if liberals are in control, a tactic of propaganda is no substitute for a public policy.

#### WAR AS A DISTINCTIVE CRITERION

The clear and present danger test, though it evolved under the pressure of the last war, is couched in general terms without specific reference to war. Traditionally, however, war itself makes demands upon both constitutional and political civil liberties, and these require separate consideration. While the Constitution provides that only *habeas corpus*, among the civil rights, may be suspended during an invasion, there is a common impression that "for the duration" many civil liberties are properly abrogated, *de facto* if not *de jure*.<sup>37</sup> This impression goes back, in part, to the excesses of the last war and the post-war Palmer period,<sup>38</sup> as those were interpreted by a generation of pacifist thought. The impression has been intensified by the debate between interventionists and isolationists, a struggle which is bound to have carry-overs throughout the present war, for the isolationists utilized as one of their chief arguments against intervention the statement that war inevitably means an abrogation of all the civil liberties.<sup>39</sup> Adopting a peculiar

<sup>37</sup> For a protest against this attitude, see Ronald Kidd, *British Liberty in Danger* (1940), pp. 193-241. For the effect of the Defense of Canada Regulations on civil liberties, see *Canadian Forum*, vol. XXI (1941), pp. 134, 176.

For sensible American discussion, see John Lord O'Brian, "Restraints upon Individual Freedom in Times of National Emergency," (1941) 26 *Cornell Law Quarterly* 523; address of Attorney General Francis Biddle, "Civil Rights in Time of Stress," (1941) 2 *Bill of Rights Review* 13.

On practical difficulties in protecting civil liberties in wartime, see address by John Lord O'Brian, "Civil Liberty in Wartime," *New York State Bar Association Reports*, vol. XLII (1919), pp. 275-313. See also Professor Chafee's chapter on "Human Machinery of the Espionage Acts," in *Free Speech in the United States*, *op. cit.*, pp. 60-79; *Liberty's National Emergency* (American Civil Liberties Union, June 1941); Robert E. Cushman, *Safeguarding our Civil Liberties*, Public Affairs Pamphlets, no. 43 (1941).

<sup>38</sup> For able reviews of this period, in addition to Chafee, see J. P. Hall, "Free Speech in War Time," (1921) 21 *Columbia Law Review* 526; Carl Brent Swisher, "Civil Liberties in War Time," *Political Science Quarterly*, vol. LV (1940), p. 321. Professor Swisher includes in his discussion our preparations for the present war.

<sup>39</sup> Cf., for a typical statement on the threat of war, Arthur Garfield Hays, *Democracy Works* (1939), pp. 108-109: "The greatest threat to Democracy is war. There are those who feel that the democracies (and Russia) should league together and fight the monster of fascism before it grows too strong. Are they not somewhat fearful that in the process of fighting dictatorship we shall ourselves come to embrace it?"

kind of democratic defeatism, they believed, or argued, that every move toward increased governmental control over opinion leads to "dictatorship." On the other hand, many interventionists welcomed the outbreak of war because they could "start shooting and stop thinking." They would like to repress criticism of military and industrial policies and would like to use the war to outlaw strikes. It is my contention, however, that the distinction between war and peace, so assiduously fostered by these rival pressure groups, has assumed an exaggerated importance. It is not a distinction on which civil-liberty policy can be soundly built in a time of international anarchy.

During the period of middle-class complacency and general optimism which so largely influenced the thought of the nineteenth century and after, many persons thought of war as an anomaly, an exception to the orderly and rational procedures to which they were accustomed. Its abolition was just around the corner. It was not realized how tenuous were the sanctions of international credit,<sup>40</sup> nor how ephemeral was the stability of balance-of-power diplomacy.<sup>41</sup> At any rate, if war should come, despite all precautions, a nation would have some choice in the matter; the war would begin when one declared it; one declared it to redress a violation of international law; one ended it by treaty, duly signed, sealed, and delivered. Neither the violence of the American Civil War, which resembled a nationalistic war, nor the short-lived Paris Commune served to shatter this picture of war as an affair between nations. In the realm of civil liberties, it seemed sensible to apply different principles as well as different practices to war, since war was an abnormal state, radically different from peace.

Today, however trite it has become to say it, we in America generally are not aware of the revolutionary character of our age. For historical parallels, we must return to the religious wars of the seventeenth century, to the Thirty Years War. Today, it is "peace" which is anomalous, not war. In the intervals of apparent peace, violence is subdued, sporadic, preparatory. It may appear in the murder of Rathenau, of King

<sup>40</sup> See Otto Kirchheimer, "Changes in the Structure of Political Compromise," *Studies in Philosophy and Social Science*, vol. IX (1941), p. 264.

<sup>41</sup> See John Maynard Keynes, *The Economic Consequences of the Peace* (1920), chap. ii.

Alexander and Barthou, in Kapp-putsch and Hitler-putsch and Cagoulard outbreaks. It occurs within the walls of concentration camps or in street battles. It may flare up, as in the civil war in Spain, only to die down and run underground and erupt elsewhere. In the crumbling of nations, neither declarations of war nor treaties appear to be more than maneuvers which do not alter the character of the basic social disturbances prevalent in a period of transition. We may even harbor the suspicion that the disregard for civil liberties in the last war was not so much caused by the phenomena of war itself, as by the violent temper of Americans under the social strains which have now become more evident, war only serving to rip the thin veneer of culture and bring the smoldering hatreds to the surface.

It is unrealistic, therefore, to rely on sharp distinctions between war and peace to test the limits of civil liberty. Such a test inhibits the creation of an effective policy before the military phase of war begins. Not only may it then be too late to build an apparatus for control of propaganda, which requires long-term planning, but hysteria induced by passing events, such as a defeat in battle, is likely to befog judgment on the immediate issues. Before Pearl Harbor, for example, civil-liberty traditions and conventional attitudes toward "friendly foreign powers" seem to have prevented aggressive measures against Axis espionage and propaganda. Shortly after Pearl Harbor, in disregard of the tradition that a person is not to be condemned without evidence, "enemy" aliens, including anti-Fascist refugees, were indiscriminately ejected from certain West Coast territories in what seems to have been an undifferentiated response to the Hawaiian laxity.

A similar failure to create in "peace" the conditions for effective "war" exists in the field of governmental propaganda (in that scholarly meaning of the word which includes long-term educative and morale-building efforts). Fear of Congressional and press opposition has been the major factor here. But civil-liberty conceptions based on the war-peace dichotomy have also played a part. Whereas most liberals will countenance an all-out propaganda effort on the part of governmental agencies to marshal the public support essential to the successful prosecution of a war, they have felt that positive governmental efforts were illegitimate in time of peace. They have been afraid that the assumed power of the government's voice would

drown out the opposition. I shall refer to this problem later, as a facet of a general attitude of laissez-faire in the opinion field. Here it is only necessary to remark that such an attitude has prevented large-scale experimentation with governmental morale and propaganda efforts. Today, in the absence of arrangements which might have had the benefit of public criticism and discussion, we have no public pattern for democratic propaganda<sup>42</sup> and must either imitate the Creel Committee,<sup>43</sup> with all of its shortsighted errors, or indulge, as we have recently been doing, in confusion and improvisation.

In the field of military censorship, public policy is similarly unprepared. One of the most obvious obstacles to coping intelligently with this problem is the relative absence of intelligent civilian understanding of military matters. This absence, like the war-peace test itself, springs in part from liberal optimism, which has left problems of war severely alone in every interval of peace. The consequence is that there are today few centers of civilian criticism which have access to military data or have experience in military matters and which are therefore in a position to estimate the validity of the claims of the military staff concerning the needs for censorship. A country becomes uneasy when it fears that many "military secrets" are kept only from the people, but are well known to the enemy. An outstanding example was the shipment of French iron ore through Belgium to Germany after the War broke out in 1939 and before the invasion of the Low Countries.<sup>44</sup> The Nazis, of course, knew of this; the French leaders chose to hide the facts from the French people, who could have put a stop to the shipment had they known. There is always the fear, moreover, that even in cases not so extreme, militarists are likely to use the excuse of "military secrets" to cover mistakes or simply to rationalize their professional suspicion of publicity—and even of the democracy of which that publicity is one of the essential pillars.<sup>45</sup> A policy for civil liberties here must be dis-

<sup>42</sup> But see C. J. Friedrich, "Controlling Broadcasting in Wartime: a Tentative Public Policy," *Public Policy*, vol. II (1941), pp. 374-401.

<sup>43</sup> For a full account of this committee, see James Mock and Cedric Larson, *Words That Won the War: The Story of the Committee on Public Information, 1917-1919* (1939). For a comprehensive analysis of the use of propaganda in the previous war, see Harold D. Lasswell, *Propaganda Technique in the World War* (1927).

<sup>44</sup> See *New York Times*, December 21, 1939, p. 14.

<sup>45</sup> See Tom Wintringham, *Armies of Freemen* (1940), especially pp. viii, 11-12, 177-181.

criminating and sophisticated. It cannot decry all censorship, if there is need for any, or simply, in the light of past experience, surrender to the military because we are "at war." The lack of civilian understanding only helps to confirm the military man's hostility to civilian criticism and his tendency to be close-mouthed. Hence, a policy for censorship must not stop with censorship alone, but must seek to educate the public to a participative understanding of military problems, and to educate the armed forces to welcome that participation as useful to the war itself and as essential for democracy's survival.<sup>46</sup> The problem is analogous when it is diplomacy rather than war that is involved;<sup>47</sup> indeed, the above analysis follows Clausewitz's dictum that the two are different only in method.

In the last war, as Chafee points out, much essential criticism of war aims and peace negotiations, of military incompetence or commercial profiteering and corruption, was stifled by the Espionage Acts, as reinforced by popular disapproval.<sup>48</sup> This is censorship not at the source of information, but at the source of criticism. If military or diplomatic censorship necessarily removes certain issues from the realm of public discussion it will be all the more vital for the government to stimulate active and critical discussion of noncensorable subjects and of its general policies. If we are not permitted to learn the details of military operations or of negotiations with enemies and allies, every effort should be made to tell us more about what is going on in the training camps, in the defense industries, in the United Nations. If the political opposition can no longer object to the war itself, it should be urged to direct its criticism to methods for winning the war and to war aims, recalling that it was not chiefly the LaFollettes who opposed the last war, but the Lodges who favored it, who sabotaged the League of Nations without suggesting an alternative.<sup>49</sup> Lest it become "unpatriotic" to be critical of governmental policies at a time when the vast expansion of executive power makes that criticism all

<sup>46</sup> See Alfred Vagts, *A History of Militarism* (1937), pp. 255-269 (on the value of an army open minded to the idea of civilian assistance), pp. 327-331 (on the unpreparedness of the military to make good use of the press for positive war purposes).

<sup>47</sup> See C. J. Friedrich, *Foreign Policy in the Making* (1938).

<sup>48</sup> *Free Speech in the United States*, *op. cit.*, pp. 102-107.

<sup>49</sup> On planning for the future in order to win the war, see the address of Representative Thomas H. Eliot, *Congressional Record*, vol. 87 (October 27, 1941), App. pp. 5185-5186.

the more essential, the government should publicly encourage radio programs and magazines, satiric movies and comic strips, to furnish outlets for informed and vigorous criticism.<sup>50</sup>

The notion sponsored by the isolationists that if a single civil liberty is interfered with on account of war, then we automatically lose all our civil liberties and are on the road to dictatorship, shows small confidence in the tenacity of democratic institutions. It is a maidenhead theory of civil liberties.<sup>51</sup> It neglects, as do former interventionists who concentrate on repressive measures or patrioteering propaganda, the variety of positive things that can be done. Nothing will bring totalitarian dictatorship more quickly than to see it where it does not exist and to use this fantasy as an excuse for avoiding responsibility for action which seeks to vindicate democracy and to remove the roots of fascism. The outbreak of active belligerency is a symptom of emergency, not its cause, and so it does not alter the applicable principles of civil-liberty policy. But it may present novel conditions to which the permanent policy must be directed. Some of those conditions—the need for military censorship, for example—have been indicated. They do not add up to a dichotomy between war and peace, and the test for civil liberties which relied on that distinction must be seen as an outgrowth of an earlier era and as having little relevance today.

What has, of course, immediate relevance for civil liberties is the probable mobilization for total war of the major part, if not the entirety, of the adult population. This mobilization threatens to destroy the wide distribution of power and possession which previously nourished civil liberties, at least among the privileged groups.<sup>52</sup> Inherent in the negative issue of pro-

<sup>50</sup> See Bernard Berelson, "The Effects of Print upon Public Opinion," Paul F. Lazarsfeld, "The Effects of Radio on Public Opinion," Donald Slesinger, "The Film and Public Opinion," in *Print, Radio and Film in a Democracy*, edited by Douglas Waples (1942), pp. 41-65, 66-78, 79-98. On radio, see also Herta Herzog, "On Borrowed Experience," *Studies in Philosophy and Social Science*, vol. IX (1941), pp. 65-95; on comic strips, see R. Asher and S. S. Sargent, "Shifts in Attitudes Caused by Cartoon Caricatures," *Journal of General Psychology*, vol. XXIV (1941), pp. 451-455.

<sup>51</sup> For recent British experience, see Cecil T. Carr, "Crisis Legislation in Britain," (1940) 40 *Columbia Law Review* 1309. Cf. Kidd, *British Liberty in Danger*, op. cit., pp. 236-237; F. A. Brewin, "Civil Liberties in Canada in War Time," (1941) 1 *Bill of Rights Review* 112.

<sup>52</sup> See further, David Riesman, Jr., "Government Service and the American Constitution," (1940) 7 *University of Chicago Law Review* 655, especially pp. 655-56, 667-669.

tection against the government is the assumption that sources of employment, wealth, and prestige which are not dependent on the government exist in the community. Tomorrow, when everyone will be at the call of the government and when most people will be working for the government either directly or indirectly, the whole United States will run the risk of becoming a company town. Apart from the government's increasing monopoly of the sources of wealth and power, it could easily—even unintentionally—uproot all free discussion by drafting critics into the army or industry and by the use of priorities to cut down media for the publication and distribution of ideas. Deployment of manpower by the Selective Service system and of materials by the War Production Board makes it necessary to be concerned with protection of enough critics and avenues for criticism to keep democracy alive.<sup>53</sup>

It would seem on the surface that this was a war problem, and as such would justify the application of distinctive civil-liberty criteria. Yet in previous wars the problem was of lesser scope, for those wars were relatively short and were fought, for the most part, in battlefield areas away from home and by a large but not overwhelming military and productive force superimposed on a traditional and undisturbed organization of society. What has made the difference is not war itself, but an increase in technical interdependence and a decrease in the possession of old-fashioned private property.<sup>54</sup> So it is that after this war (which may last for many years), it is most unlikely that we can, or even if we can that we will want to, return to "normalcy." The government will continue to exercise what seem now to be only "war" controls. These risks to democracy, therefore, are inevitable. They can be coped with only by exploring new patterns of decentralization of power,<sup>55</sup> based not so much on the possession of independent property

<sup>53</sup> Cf. Police Commissioner Valentine's wrath over the criticism of New York City's civilian-defense system by a group of 500 air-raid wardens; he declared that he would not tolerate "insubordination." *New York Times*, February 20, 1942, p. 19.

<sup>54</sup> Cf. Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (1933), pp. 285, 346-347; Marshall E. Dimock and Harold U. Hyde, *Bureaucracy and Trusteeship in Large Corporations*, Monograph no. 11, Temporary National Economic Committee (Washington: Government Printing Office, 1940).

<sup>55</sup> See, e.g., Rensis Likert, "Democracy in Agriculture—Why and How?" *Yearbook of Agriculture* (Washington: Government Printing Office, 1941), pp. 994-1002.

as upon awareness of participation by everyone in the making of communal decisions. To this end, hours not spent in working for the government must be devoted to local activities<sup>56</sup> which will enhance participation and responsibility, such as neighborhood discussion groups and like methods of developing spontaneous criticism and deeper understanding.<sup>57</sup> This is the problem of the future, and we have only the most tentative of clues to guide us in preparing for it.

#### THE BELIEF IN CIVIL LIBERTIES AS A TEST

The test to which I now turn is definitely a recent growth. Its very formulation is symptomatic of a reorientation of attitude among a growing number of liberals.<sup>58</sup> The test would deny civil liberties to those who would deny them to others. It appears in various popular slogans: "No tolerance for the intolerant"; "Civil liberties are not to be used to destroy civil liberties"; "The Bill of Rights should not protect those seeking to subvert it." This approach has one merit lacking in the others previously put forward. It implies that its expounders have abandoned the unproven hope that their example of noninterference will convert the foes of civil liberties,—a form of civil pacifism in time of civil crisis which has the same deficiencies as other forms of nonresistance. The test implies, moreover, that civil liberties constitute an active cause, deserving of protection against its enemies like any other and not above the battle. Yet, despite these superiorities, the test raises, so it seems to me, several ethical objections and insurmountable administrative difficulties.

It is true that groups which have been active in the defense of civil liberties, such as the American Civil Liberties Union, continue to defend them for the enemies of civil liberty, but the reasons given for this seemingly paradoxical behavior are

<sup>56</sup> Compare Otto Kirchheimer's discussion of the political activities of public officials in "The Historical and Comparative Background of the Hatch Law," *Public Policy*, vol. II (1941), pp. 341-373.

<sup>57</sup> See Stephen Spender, "London Letter," *Common Sense*, vol. XI (April 1942), p. 125.

<sup>58</sup> See, among others, Max Eastman, "Limits of Free Speech," *American Mercury*, vol. LIII (October 1941), pp. 444-447; Lewis Mumford, *Men Must Act* (1939), *Faith for Living* (1940); Max Ascoli, "Freedom of Speech," *American Scholar*, vol. IX (January 1940), p. 97, replied to by Herbert Schneider, *American Scholar*, vol. IX (July 1940), pp. 378-379. Compare Carl Becker, "Freedom of Speech," *The Nation*, vol. 138 (1934), p. 94.

patently inadequate. The Union, for example, argues that governmental restraint is legitimate only "at the point of action contrary to the Bill of Rights, not in relation to theories."<sup>59</sup> This fallacious distinction between verbal and nonverbal behavior is an evasion of responsibility which gives the former an unjustifiable immunity from supervision. The Union seeks to buttress this untenable position by the assertion that to judge whose right of free speech should be defended would be unwarranted, because the Union "does not engage in political controversy. It takes no position on any political or economic system." It is hard to see what a political issue is if defending or denying freedom of speech for Nazis is not one. This attitude toward "theories" and "political controversy" typifies the negativism and "objectivity" of a certain group of influential liberals who wish to protect freedom of speech without any exploration of what free speech is for.

Nevertheless, the position that this group takes is intellectually defensible, within limits and on other grounds. In the first place, there is no reason to assume, *a priori* and apart from specific social programs, that those who would deny civil liberties to their opponents are taking a position so diabolical that the public should not hear their case. No existing ideology seeks to deny *all* civil liberties to everyone. Fascism, according to Borgese, promulgates the "freedom" of the "one," Il Duce, in exchange for the slavery of the rest of the population.<sup>60</sup> Nazis argue, in analogous vein, that in exchange for freedom of opinion they provide opportunity to work and sexual freedom for *Volksgenossen*;<sup>61</sup> Communists, that they provide racial equality and the right to work for everyone save members and

<sup>59</sup> *Everybody's Rights* (American Civil Liberties Union, 1938); *Why We Defend Free Speech for Nazis, Fascists, and Communists* (American Civil Liberties Union, April 1939). But recognizing the basic conflict in point of view, the Union recently denied membership on its Board of Directors or employment on its staff to any "member of any political organization which supports totalitarian dictatorship in any country, or who by his public declarations indicates his support of such a principle." The Communist Party, the German-American Bund, and native organizations which were obviously antidemocratic were included. See *A Statement to Members and Friends of the American Civil Liberties Union* (May 1940). For the similar action of the National Council on Civil Liberties in Great Britain, see Roger Baldwin, "Liberalism and United Front," in *Whose Revolution?* edited by Irving De Witt Talmadge (1941), pp. 170-171.

<sup>60</sup> See G. A. Borgese, *Goliath, the March of Fascism* (1937).

<sup>61</sup> See Point 7 of the party program of 1920, given in Gottfried Feder, *The Programme of the N. S. D. A. P. and Its General Conceptions* (tr. Dugdale, 1932), pp. 18-19. But see Ludwig Hamburger, "Labor Under Hitler," *American Mercury*, vol. LII (1941), pp. 730-736 (are workers under the swastika slaves?); *Interna-*

descendants of the old "exploiting" classes, and that they permit a narrow ambit of criticism of intermediate methods and objectives, though not of ultimate aims. Consequently, any judgment that these radical groups should be denied the right to urge their case—a case which includes as one of its features the denial of certain civil liberties to certain opponents—is in fact a concealed judgment concerning the worth of the total aims of these groups. Such a judgment is sometimes accompanied by the opinion (unproven) that the social aims sought, even if valid, cannot morally and permanently be attained by repression of contradictory views.

In the second place, the denial of freedom of expression to those who disbelieve in it is inconsistent with orthodox, although perhaps erroneous, conceptions of the democratic theory.<sup>62</sup> Under that theory, a majority is entitled to abandon traditional civil liberties if it follows the constitutional forms. Democrats for whom democracy means majority rule must therefore logically insist that this putative anti-civil-liberty majority should have the opportunity of hearing evidence that it would be better off in the absence of, say, freedom of speech and press. It is a plausible counterargument that one majority should have no right to preclude future majorities from reopening the issue and arriving at a different conclusion,<sup>63</sup> and therefore no right—although all else is open to them—to tamper with the procedures of free opinion formation and electioneering which permit a present minority to become a future majority. Yet the view which would deny free speech to those bent on its destruction is not urged as a limitation upon the power of majorities, but rather as a definition of the civil-liberty protection to which anti-civil-libertarians are en-

*tional Labor Review*, vol. XLIV (August 1941), p. 215 (employment of foreign women in Germany). On "Gesunde Erotik," see Joseph Close Harsch, *Pattern of Conquest* (1941).

See in this connection Dorothy Fosdick, *What Is Liberty?* (1939), pp. 66-68, analyzing the liberty of the Nazis, as expounded by Alfred Rosenberg, and the liberty of the Communists.

<sup>62</sup> See letters of Jefferson to J. W. Eppes (1813), Governor Plumer (1816), T. Earle (1823), reprinted in S. K. Padover, *Democracy by Thomas Jefferson* (1939), pp. 25-26.

<sup>63</sup> But those who believe differently on this point, too, those, for instance, who take the Hobbesian position that the original social compact was a final surrender of sovereignty to the then majority and its institutional successors, should, under orthodox civil-liberty theory, be entitled to present their case. See Thomas Hobbes, *Leviathan*, Part II, chap. xvii.

titled.<sup>64</sup> It is a definition which states that every opinion can be voiced except opinion which would deny civil liberties. These parallel political principles: inviolability of civil liberties (until they are violated by those who take advantage of them) and inviolability of majority rule (until violated by a majority which wishes no successors), are obviously formal principles and do not solve concrete problems. Such formality can be given positive content only by a view of civil liberties which sees them as integral parts of a total social structure. And only in such a view can decisions be made on specific issues involving limitations upon civil liberties for the sake of civil liberties, or for the sake of other social ends. I shall return later to this question; now I wish to leave the intricate theoretical difficulties of the test which would deny civil liberties to disbelievers in order to examine its workability.

Where liberals favor such a test, they are likely to link Communists and Nazis as the two radical groups opposed to traditional freedoms. Yet Communists today profess their affection for civil liberties and other democratic procedures. Is their new-found orthodoxy to be taken at face value? Their often-obstructive operations within unions,<sup>65</sup> pressure groups,<sup>66</sup> charitable organizations,<sup>67</sup> etc., violate the spirit of civil liberty if not its forms. In order to dominate the affairs of these groups, where they form a ruthless minority, they make use of a great variety of disingenuous parliamentary maneuvers. They hold their own members in line by intimidation, and systematically boycott and slander dissidents.<sup>68</sup> Is this course of behavior, naturally difficult to prove, relevant in discounting Communist professions of devotion to civil liberties? Can those professions

<sup>64</sup> Cf. Edwin Mims, Jr., *The Majority of the People* (1941).

<sup>65</sup> For detailed accounts of Communist Party tactics in the Machinists Union, the Carpenters Union, the United Mine Workers, the Furriers Union, and the International Ladies Garment Workers Union, see David M. Schneider, *The Workers (Communist) Party and American Trade Unions* (1928); Anthony Bimba, *History of the American Working Class* (2d ed., 1933), pp. 308-312, 338-349; Selig Perlman and Philip Taft, *History of Labor in the United States* (1935), vol. IV, pp. 538-561.

<sup>66</sup> For an analysis of Communist tactics in various "united fronts," see Roger N. Baldwin, "Liberalism and United Front," *op. cit.*, pp. 172-179.

<sup>67</sup> For example, see *New York Times*, January 7, 1941, p. 1, for an exposé of the diversion for Communist propaganda of funds of United American Spanish Aid Committee.

<sup>68</sup> Cf. Daniel Lang, "It's Hard to Recant," *Twice a Year*, vol. V-VI (1940-41), p. 487. See *New York Times*, May 5, 1941, p. 15 (eleven members of the Communist-led Newspaper Guild were threatened with expulsion because they criticized the leadership for precipitating a strike).

be further discounted because of Communist adherence to or sympathy for the Stalinist dictatorship, discounted even during the periods when that dictatorship orders united-front tactics in America?

The attitude toward civil liberties by American Nazis and fascists is similarly elusive when one leaves the realm of what they do for the realm of what they say. These groups try to gain support by open contempt for democratic ways, and at the same time they seek to disarm countermeasures and divert attention by throwing the onus of "dictatorship" upon their enemies, both Communist and democratic. Indeed, their attitude is probably only less ambivalent in fact than in pretense, since the symbols of democracy are still potent to conjure with, even among persons almost entirely authoritarian who desire the reassurance of some part of the traditional verbal patterns just when they are setting out upon a course of radically untraditional behavior. No doubt the ambivalence would increase if adoption of the proposed formula made it expedient for these domestic fascists to avow publicly their love for civil liberties. If the political rules which forbid advocacy of violent overthrow of government are applied to them, they must be protected when they advocate constitutional amendments which insure political extinction and economic devastation of "inferior" groups,<sup>69</sup> while they themselves can be lawfully suppressed only when they urge a forceful wresting of equality or freedom from these same groups. Falsehood and perjury are basic techniques of all antidemocratic groups, and Hitler lost nothing by his repeated assertions that he was following the path of constitutional legality.<sup>70</sup>

If there were only these probative obstacles to dealing with Communists and Nazis and if these extremist groups presented the only problem, the test might somehow be manageable. But in fact many, if not most, American groups, as they admit or as can be inferred from their behavior or ultimate beliefs, would if they could deny certain civil liberties to some of their political opponents. The machine politicians of America were the inventors of many of the tactics used by Communists and

<sup>69</sup> See the speeches of defendant members of the German-American Bund in the record in *New Jersey v. Klapprott*, 22 Atl. (2d) 877 (1941).

<sup>70</sup> See Hitler's testimony before the Supreme Court in Leipzig during the famous Reichswehr trial that he would use only legal methods, cited in Konrad Heiden, *A History of National Socialism* (1935), pp. 134-135.

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Nazis, though perhaps the former lack the high degree of skill bred of fanaticism. And these politicians, it goes without saying, pay their respects to "the Constitution" and the Bill of Rights on appropriate occasions such as July Fourth. More seriously, some of the most entrenched political forces in the United States give only a tenuous adherence to civil liberties when it is their opponents' liberties that are in question. Where reactionary Catholics are in control, they seek to deny freedom of expression to "Reds" (as defined by them), to atheists, to advocates of nonrhythmic birth control.<sup>71</sup> Protestant fundamentalists have sought to silence evolutionists, and some from the same background would silence Catholics or Jews, and of course Negroes.<sup>72</sup> Business groups, such as the National Association of Manufacturers, veterans' organizations, the Hearst opinion empire, have sought to curb civil liberties for critics of capitalism, as well as for critics of "democracy" (as defined by them).<sup>73</sup> The list is as endless as it is familiar. But it must be referred to as a reminder of the powerful, though often covert and even subconscious, opposition to civil liberties in the American community.<sup>74</sup> Some time ago, in fact, a *Fortune* poll indicated that a majority of the electorate were prepared to deny civil liberties to various shades of radicals, mostly of the left.<sup>75</sup>

<sup>71</sup> Witness Catholic support of the Devany law in New York (C.S.L. §12(a), Laws of 1940, c. 564) denying state employment to persons "advocating overthrow of government by force," etc. The bill was also supported by the state American Legion. *New York Times*, September 10, 1939, p. 17. Cf. the Pastoral Letter of Archbishop McNicholas in interpretation of the encyclicals of Pope Pius XI on Communism and Nazism, cited in *The Commonwealth*, vol. XXXV (November 1941), pp. 83-84. Locke, in his *Essay on Toleration*, was prepared to deny religious toleration to Catholics on the ground that they would deny to others the rights they themselves sought.

<sup>72</sup> The most famous case, of course, is the Scopes trial in Tennessee in 1923 under the Tennessee Anti-Evolution Law (Michie's Code, 1938, §§ 2344-5). A similar law is on the statute books in Mississippi (Miss. Code Ann. 1930, §§ 7315-16).

On Negroes, see Horace R. Cayton and George S. Mitchell, *Black Workers and the New Unions* (1939), pp. 49-51.

<sup>73</sup> See "Propaganda over the Schools," *Propaganda Analysis*, vol. IV, no. 4 (1941), p. 1, for a description of the role of the National Association of Manufacturers, the American Legion, the taxpayers' associations, the churches, and the real-estate boards in opposition to "radicalism," "unionism," and "progressivism," and all education not consonant with propaganda for the maintenance of the social, religious, and economic *status quo*. On Hearst, see Raymond Gram Swing, *Forerunners of American Fascism* (1935), pp. 134-152.

<sup>74</sup> See Louis G. Silverberg, "Citizens' Committees: Their Role in Industrial Conflict," *Public Opinion Quarterly*, vol. V (March 1941), p. 16. For current attitudes, see Alfred Winslow Jones, *Life, Liberty and Property* (1941). See also Horace M. Kallen, "Behind the Bertrand Russell Case," *Twice a Year*, vol. V-VI (1940-41), p. 312, for the role of Catholic, Jewish, and Protestant fundamentalists.

<sup>75</sup> *Fortune*, vol. XXI (February 1940), p. 136.

The popularity of the Dies Committee suggests a similar trend. It follows that the proposed test, if firmly applied, would bring to the surface the latent civil conflicts of our society. It would lead to an open struggle between progressive and reactionary forces, each seeking to deprive the other of those civil liberties which are the means of gaining power. And in view of the trends indicated, the suggested test would probably be captured by the reactionaries and used to harass unpopular or weak minorities, whose chances of getting into power and denying civil liberties to others are negligible at the present time. This does not mean that liberals run no risks if they sit tight, hoping for the best. It does mean that democrats who care for civil liberties need not only a policy for dealing with their enemies—a policy which no formula can embrace—but also a strategy for carrying out the policy in the face of popular apathy and reactionary strength. I turn briefly to the attempts that have been made.

#### "VIOLENT OVERTHROW OF GOVERNMENT"

After the close of the last war, the various European democracies engaged in an astonishing variety of efforts, legislative and administrative, to limit the civil liberties of actually or allegedly antidemocratic groups. Professor Karl Loewenstein has summarized these efforts in his articles on "Legislative Control of Political Extremism in European Democracies."<sup>76</sup> Since he wrote, there have been additional attempts in those countries which in the meantime had not succumbed to fascism.<sup>77</sup> On the whole, these efforts were not attended with suc-

<sup>76</sup> (1938) 38 *Columbia Law Review* 590-622, 725-774. See also Robert D. Gibbs, "Recent Legislative Attempts to Curb Subversive Activities in the United States, (1941) 10 *George Washington Law Review* 104; Carl Brent Swisher, "Civil Liberties in War Time," *Political Science Quarterly*, vol. LV (1940), p. 321.

<sup>77</sup> France: Under Daladier three measures were taken. One decree of April 21, 1939 [*Journal Officiel* 5295] forbade defamation of certain groups; another of the same date [*ibid.*, 5296] forbade the receipt of funds from abroad for purposes of propaganda; a decree of September 26, 1939 [*ibid.*, 11770] dissolved the communist organizations.

Netherlands: Law of May 13, 1939 [1939 *Staatsblad van het Koninkrijk der Nederlanden* no. 200] restricting the right of association and assembly.

Norway: Law of May 13, 1937 [1937 *Norsk Lovtidende* 188, mentioned in *Bulletin de l'Institut Juridique International*, vol. XXXVIII (1938), p. 91] forbidding political uniforms.

See also "La Lutte contre le Communisme," *Bulletin de l'Institut Juridique International*, vol. XXXIX (1938), pp. 70-72, with reference to the Constitution of Brazil of 1937 and to a bill in Uruguay. See also notes 78 and 79 *infra*.

cess, largely because the administration was itself infected with the fascist virus or was indifferent to it. In Switzerland, however, political extremism does seem to have been curbed by legislation coupled with vigorous local administration.<sup>78</sup> The Czechs were approaching a limited control of agitation by their domestic fascists when Hitler interrupted the experiment.<sup>79</sup> And the British Public Order Act of 1936, despite earlier aberrations,<sup>80</sup> seems to have put Mosley's British Union of Fascists out of business. So it cannot be asserted, on the basis of European experience, that legislation is an entirely futile weapon, but rather that the difficulties are immense and the social conditions of the time all but controlling.

American legislation against the foes of civil liberties has not been nearly so variegated or extensive. Apart from constitutional obstacles, most liberals have in the past opposed legislation of any sort on principle. Even those who refuse actively to defend free speech for anti-civil-libertarians, in accordance with the test just now discussed, have generally also refused passively to frame or sponsor legislation to control such dangers as that speech may entail. They have believed, in most concrete situations, that no statute could be drafted to deal even with admitted dangers that would not be abused in its enforcement, or, if enforcement lay in liberal hands at the time, that would not set a bad precedent for the enemies of liberalism—as if these needed precedents. They have freely used the clear

<sup>78</sup> See the Decree of the Federal Council of December 5, 1938 [54 Recueil Officiel des Lois (1938) 880-882], forbidding foreign propaganda which tends to modify the political institutions of Switzerland, "deriding democratic principles . . . propagating inexact news for this purpose;" and "inciting to hatred because of race, religion, or nationality. . . ." The Federal Council can dissolve those groups or enterprises which endanger national safety, and can forbid propaganda directed against the political and cultural institutions of Switzerland; it can ban "newspapers or periodicals which served the realization of one of the acts provided for by this decree." Provision is made also for the banning of meetings and processions. See also the decree of May 27, 1938 [*ibid.*, 249] and the one of July 1, 1938 [*ibid.*, 306]. In 1940 the Communist Party and all fascist parties were banned. *New York Times*, November 14, 1940, p. 2; November 20, 1940, p. 3; November 28, 1940, p. 4.

<sup>79</sup> See the decree of December 23, 1938 [1938 *Sammlung der Gesetze und Verordnungen des Czecho-Slowakischen Staates* no. 355] providing: "New political parties can be established only with permission of the government. . . ." The law of October 24, 1933, which did not go quite so far, is discussed by Karl Loewenstein, "Legislative Control of Political Extremism in European Democracies," 38 *Columbia Law Review* 607-610.

<sup>80</sup> See Kidd, *British Liberty in Danger*, *op. cit.*, pp. 75, 118, 130-137, 174. See also "Public Order and the Right of Assembly in England and the United States: A Comparative Study," (1938) 47 *Yale Law Journal* 404.

and present danger test as a weapon to invalidate statutes drafted by others, but not as a spur to the framing of an independent legislative policy.

The conservatives and reactionaries have not been so inhibited. With some exceptions, they have also relied upon a formula. What they have condemned, in the criminal-syndicalism and criminal-anarchy laws of many states, as well as in more recent legislation aimed at Communists, is the advocacy of violent overthrow of government or the assassination of officials.<sup>81</sup> Recently Congress has sought to deny federal employment, including WPA work, to advocates of what it believes to be "subversive" views.<sup>82</sup> But not until the Alien Registration Act of 1940 did Congress adopt this technique on a nationwide scale, in a little-noted section of the statute forbidding anyone, citizen or alien, from making a variety of seditious utterances.<sup>83</sup>

The legislative pattern which forbids advocacy of violent

<sup>81</sup> In 1939 these laws were in force in 44 states, and there were more than 775 reported prosecutions under them from 1919 to 1939. See Lipsig, *Sedition, Criminal Syndicalism, and Criminal Anarchy Laws*, *op. cit.*; E. F. Dowell, *A History of Criminal Syndicalism Legislation in the United States* (1939). For the most recent cases under the Oklahoma syndicalist law, see (1940) 9 *International Juridical Association Bulletin* 3 and *ibid.* (1941) 139.

<sup>82</sup> See the Hatch Act, 53 Stat. 1148 (1939), 18 U. S. C. Supp. V §§ 61, 61 (i) (1939), the National Youth Administration Act, Public No. 665, 76th Cong., 3d Sess. (1940), the Works Project Administration Act, 53 Stat. 935 (1939), 15 U. S. C. Supp. V c. 16 (1939), and the several appropriation acts. Compare the Works Project Administration Act of 1941, Pub. Res. No. 88, 76th Cong., 3d Sess. (1940), naming the Communist Party and the Nazi Bund, and also Report of Civil Service Commission, May 29, 1941, cited by R. D. Gibbons in "Recent Legislative Attempts to Curb Subversive Activities in the United States," (1941) 10 *George Washington Law Review* 104, 116-117.

<sup>83</sup> Smith Act, Section 2 of the Alien Registration Act of 1940 (18 U. S. C. § 10). For an informative account of the inclusion of this restriction on speech in an Alien Registration Act, see Chafee, *Free Speech in the United States*, *op. cit.*, pp. 440-455. See also Herbert Wechsler, (1941) 9 *American Law School Review* 881, 888-889, for an analysis of this Act in the light of former free-speech decisions.

In a series of laws passed in 1903, 1907, 1917, 1918, and 1921, aliens who are anarchists, who advocate the overthrow of the government by force or violence, the assassination of public officials, the unlawful destruction of property; or who are opposed to all organized government; or who are affiliated with or members of any organizations advocating any of the foregoing are subject to exclusion and deportation. 8 U. S. C. A. §§ 137-157.

On the question of whether membership in the Communist Party brings aliens within the proscribed classes, see *Strecker v. Kessler*, 95 F. (2d) 976 (1938), aff'd with modification, 307 U. S. 22 (1938), where the Circuit Court of Appeals found that the Party was not advocating the use of force; *Schneiderman v. United States*, 119 F. (2d) 500 (1941), cert. granted, 62 Sup. Ct. 98 (1941) (can citizenship be canceled because the applicant was a member of the Communist Party at the time of naturalization?) For comment see (1938) 87 *University of Pennsylvania Law Review* 226; (1938) 48 *Yale Law Journal* 111.

overthrow must fail of ethical justification, because it should never be assumed as a matter of course that a particular government deserves to stand, even if violence or the urging of violence is the only method by which, for all practical purposes, it can be overthrown.<sup>84</sup> And this is even more true if the society which so defends itself is not completely open to peaceful alteration.<sup>85</sup> Legal condemnation of opposition by means of violence or incitements to violence (and here again we cannot properly distinguish between the verbal and the nonverbal activity directed toward related ends) can only be justified within the self-limited terms of a particular legal and political order, but not under a transcendental criticism such as is implied in the Lockian and Jeffersonian "right of revolution."<sup>86</sup> This emphasis on *physical* violence as the worst of all possible evils, even when employed, as it conceivably might be, to redress brutal slavery or other intolerable wrongs, resembles the sharp distinction drawn by the war-peace test between overt belligerence and other forms of social crisis.<sup>87</sup> There is a distinction, of course: physical violence and war have ultimate, nonredressable qualities. But the distinction is nevertheless one of degree, and we must never overlook the extent to which nonphysical coercion is in its effects often as nonredressable as death.

When we turn from these highly controversial considerations to the question of the efficacy of the "violent overthrow" statutes, we are on surer ground. In Professor Wechsler's words: "The legislation which speaks in terms of advocacy of violent overthrow falls patently wide of the mark. It represents an uncritical acceptance of a formula devised during the days when the Communist Manifesto represented the technique of revolution, when revolutionaries operated by declaring

<sup>84</sup> Compare the analogous point made with reference to the criminal law by T. H. Green, *Lectures on the Principles of Political Obligation* (1927), pp. 190-194, and the discussion in Jerome Michael and Herbert Wechsler, "A Rationale of the Law of Homicide II," (1937) 37 *Columbia Law Review* 1261, 1298-99. For Bentham's view, the greater the injustice, the greater the need for repression, see *Theory of Legislation* (Ogden ed., 1931), pp. 364-365.

<sup>85</sup> Cf. C. J. Friedrich, "The Constituent Power, the Amending Power, and Revolution," *Constitutional Government and Democracy*, *op. cit.*, chap. viii; Alfred Meusel, "Revolution and Counter-Revolution," *Encyclopedia of the Social Sciences*, vol. XIII, p. 367.

<sup>86</sup> See letters of Jefferson to William S. Smith (1787), Samuel Kercheval (1816), J. Cartwright (1824), reprinted in Padover, *Democracy by Thomas Jefferson*, *op. cit.*, pp. 31-32, 104. See also Lincoln's Mexican War Speech, January 12, 1848, in *Complete Works*, edited by Nicolay and Hay (2d ed., 1905), vol. I, p. 338.

<sup>87</sup> See pp. 45-52 *supra*.

rather than disguising their principles; when revolutionaries accepted rather than rejected the rule of reason; when they played upon the aspirations of men rather than upon their prejudices."<sup>88</sup> We saw earlier that the Communists have today abandoned this technique and that the rightist enemies of American democracy seldom advocate its overthrow. For instance, the defendants in the Christian Front conspiracy trial in Brooklyn contended that their purpose in amassing arms was to protect the true government against its illegal seizure by the Communists.<sup>89</sup> Since the legislation in question condemns, not a hypothetical revolutionary intention, but advocacy of violent overthrow of presumably democratic institutions, it is no easy matter for a prosecutor to cut through these insincere pretensions to establish evidence of guilt under the law. But the inadequacy of such legislation as a defense against the really antidemocratic forces does not mean that it is innocuous. Those that fall within its net are likely to be small, powerless groups like the Minneapolis Trotskyites who have inherited the type of overtly revolutionary program which the Communists no longer follow, and who are, it seems obvious, no menace to our institutions.<sup>90</sup> Moreover, even statutes which are declaratory or sanctionless or evitable by counsel may seem to represent the power structure and beliefs of the community and so may serve, in impalpable ways, to intimidate socially desirable behavior. As in the striking and analogous case of teachers'-oath laws,<sup>91</sup> they may seem to threaten what can be done to rebels if these, by aggressive action, arouse the powers-that-be to use efficacious force more directly.

<sup>88</sup> (1941) 9 *American Law School Review* 881, 888-889.

<sup>89</sup> See *New York Times*, April 10, 1940, p. 22; *New York Herald Tribune*, May 16, 1940, p. 12; June 13, 1940, p. 23; June 14, 1940, p. 14.

<sup>90</sup> See *United States v. Goldman et al.* D. Minn. 1941 (unreported). Twenty-nine leaders of a local C. I. O. teamsters' union involved in a jurisdictional struggle with the A. F. L. were indicted under the Smith Act of 1940 (18 U. S. C. §§ 9 and 10) and under 18 U. S. C. § 6 on evidence that they were members of the Socialist Workers Party. All were acquitted on the sedition charge, but 18 were convicted on charges of conspiracy to create insubordination in the armed forces of the United States (18 U. S. C. §§ 9 and 10). For comment, see I. F. Stone, "G-String Conspiracy," *The Nation*, vol. 153 (July 26, 1941), p. 66; "Legal Techniques for Protecting Free Discussion in Wartime," (1942) 51 *Yale Law Journal* 798, 806-807.

<sup>91</sup> Statutes prescribing loyalty oaths for teachers had been enacted in 21 states by 1936. See C. J. Friedrich, "Teachers' Oaths," *Harper's Magazine*, vol. 172 (January 1936), pp. 171-177; George Gardiner and Charles Post, "The Constitutional Questions Raised by the Flag Salute and Teachers' Oath Acts in Massachusetts," (1936) 16 *Boston University Law Review* 803.

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### THE BACKGROUND OF AMERICAN VIEWS

Save for the "violent overthrow" legislation, which is protection for the government, the tests just considered are attempts to circumscribe within narrow limits the repressive measures which the government may take in the civil-liberty field. This latter is what I have termed the negative issue, and it is the issue to which, until very recently, most attention has been given. The inadequacy of civil-liberty policy today can be seen not only in the failure of the tests to deal satisfactorily with that issue standing alone, but more generally in the very fact of concentration upon a negative problem, with a concomitant neglect of the problem of creating civil liberty by positive governmental action in the various social and occupational groups which make up our society.<sup>92</sup> To understand more fully the relation between positive and negative attitudes with regard to governmental action, it is necessary to examine the background of American views about civil liberties, including some reference to the social conditions which nurtured those views in the past and which today compel their reappraisal. In the light of that background, it may be possible both to understand the objectives sought by the various tests and to envisage the changes toward which a more positive policy would drive.

The natural-rights view of civil liberty, which was carried by the English colonists to America, was the Protestant, Lockian derivative of much earlier intellectual strains.<sup>93</sup> This view maintained that each man is endowed by nature with the capacity to think, to speak, and to employ the simple natural resources; that these are his natural rights, neither derived from

<sup>92</sup> See Horace M. Kallen, "Why Freedom Is a Problem," *Freedom in the Modern World* (1928).

<sup>93</sup> Cf. Franz Neumann, *The Function of the Law in Rousseau's Philosophy* (unpublished manuscript, 1935), dealing with the positive and negative issues of law and liberty. On the influence of natural-rights philosophy, see Carl Becker, *The Declaration of Independence* (1922), pp. 24-79. Cf. R. M. MacIver, "European Doctrines and the Constitution," in *The Constitution Reconsidered*, edited by Conyers Read (1938), pp. 51, 60. On the Protestant heritage, see Thomas Cumming Hall, *The Religious Background of American Culture* (1930), especially chaps. viii, ix, and x.

For a good brief account of seventeenth-century precursors, see Harold J. Laski, "The Rise of Liberalism," in *Encyclopedia of the Social Sciences*, vol. I, pp. 103-124. On Locke, see G. E. G. Catlin, *Story of the Political Philosophers* (1939), pp. 288 *et seq.* Cf. Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (1941). See, generally, Mims, *The Majority of the People*, *op. cit.* For the influence of Newton, see Daniel J. Boorstin, *The Mysterious Science of the Law* (1941), pp. 11-18.

communal society nor dependent on it. The function of the state toward the exercise of these rights was simply to provide order in society for their enjoyment. Faith in natural law and in man's rationality made it seem evident that the individual would be sensible in his employment of these resources and capacities, and the American pioneer experience seemed to give support to that faith.

The driving force behind this conception of civil liberty was the rising middle class. This class found itself confronted, in the eighteenth century, with medieval patterns of behavior which were dying but were still tenacious and oppressive. These patterns did not depend for their enforcement on rationality or on consent, but on tradition and repression. This was as true in the intellectual sphere, where religious intolerance and, in England, stringent laws of criminal libel limited discussion of public affairs, as in the economic sphere, where religious guidance, as about usury and the "just price," had been followed by mercantilism.<sup>94</sup> Civil liberties were, in this situation, specific, concrete weapons for fighting old barriers and old controls.<sup>95</sup> Freedom of speech and press meant the right to criticize authority, either as actualized in king or church or nobles, or in the form of anonymous, but equally sacrosanct, custom and tradition. Freedom of assembly included the right to petition and to take part in legislative deliberations, for it was in the legislature rather than in the executive that the middle class was represented. *Habeas corpus* and similar rights were necessary to give security for individual enterprise against arbitrary action on the part of the government. And obviously freedom of property was closely linked with the needs of the new economic organization of society.

But it would be oversimple to see the middle-class claims for civil liberties as merely political and economic weapons with a theological or natural-law inspiration. The persisting strength of these eighteenth-century conceptions of civil liberty rests on additional factors. Their pattern of rational political thought was not only a useful contrast to the rationally undefended feudal traditions, but was also in tune with the pattern of

<sup>94</sup> On religious restraints, see R. H. Tawney, *Religion and the Rise of Capitalism* (1926), pp. 179 *et seq.*, and comments in Svend Ranulf, *Moral Indignation and Middle Class Psychology* (Copenhagen: Levin and Monsgaard, 1938), p. 15.

<sup>95</sup> See Walton H. Hamilton, "Freedom and Economic Necessity," in *Freedom in the Modern World*, edited by Horace M. Kallen (1928), p. 25.

middle-class behavior itself, both in its phase of Protestant self-control and concern for salvation, and in its phase of scientific exploration and capitalistic organization.<sup>96</sup> In addition, the universal, abstract character of this thought provided a morally justifiable disguise for grievances which arose from class demands and from hostility generated by the repressions of the ruling classes, and advanced the needs of a certain sector behind the just desires of all mankind. The age's faith in reason made it seem possible, moreover, that classes of society which had different economic and political interests might be swayed by arguments couched in terms of universal appeal;<sup>97</sup> and the age's habit of abstract thought tended to the reification of terms like "democracy" or "liberty," and the overlooking of concrete meaning in a sweep of rhetoric.<sup>98</sup> Finally, since the struggle of the middle classes for power was a victorious one, the particular liberties they had sought became no longer simply *claims*, but *civil liberties*; that is, they were given legal protection and political recognition. This again served to conceal their origin in specific intellectual and social conditions, since they became institutionalized in the political structure of the entire society.

In the United States, the feudal traditions of the continent never really took hold. The few trappings that surrounded the royal governors were dismantled by the Revolution. Consequently, there has been no social basis in this country for the expression of open and articulate pre-Lockian reactionary positions. Even in literary and university circles, the revolutionary conceptions of civil liberty have not encountered opposition from royalists of the type of Charles Maurras or reactionaries like the "universalist" economist Othmar Spann.<sup>99</sup> On the other hand, no aggressive proletarian movement has developed to press new claims for civil liberties hostile to or in addition

<sup>96</sup> Cf. Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (tr. Talcott Parsons, 1930).

<sup>97</sup> Compare the present manipulative practice of consciously addressing contradictory appeals to various classes in the population, carried to its greatest heights by the Nazis. See, e.g., Ernst Kris, "German Propaganda Instructions of 1933," *Social Research*, vol. IX (February 1942), pp. 46, 66-67.

<sup>98</sup> For the influence of aesthetic symmetry, compare Boorstin, *The Mysterious Science of the Law*, *op. cit.*, pp. 85-105.

<sup>99</sup> The views of Maurras, editor, with Léon Daudet, of the *Action Française* for many years, are indicated in his *Trois Idées Politiques* (1898), *Enquête sur la Monarchie* (1925), *Au Signe de Flore—Souvenirs de Vie Politique* (1931). See, e.g., Percy M. Jones, "Intellectual Reaction in France," *Hibbert Journal*, vol. XXV (1926-1927), p. 159. For Othmar Spann, see his *Fundamente der Volkswirtschaftslehre* (4th ed., 1929) and *Gesellschaftsphilosophie* (1928).

to the existing scheme. With few exceptions, each new generation of immigrants felt that it had left behind all of Europe's age-old repressions and was glad to accept as unalterable that pattern of political freedom which seemed permanently guaranteed in the American way of life. This appearance of permanence was further aided by the fact that the civil liberties were not only enshrined in bills of rights, as on the Continent, but were implemented by the effective sanctions of judicial supremacy. In view of this history, it is hardly surprising that the dominant intellectual attitudes in the United States toward civil liberty remain today those that were handed down, or developed from, the heavenly city of the eighteenth-century philosophers, and that in the absence of opposition these attitudes have become soft.

In course of time, however, the pure natural-rights position, which rules out all communal supervision, has largely given way to a view that we may term, following D. W. Meiklejohn,<sup>100</sup> the public-utility position, which permits communal regulation of civil liberties in the interest of the common good. The latter view received its most influential formulation at the hands of the utilitarian philosophers, from such men as Bentham and John Stuart Mill,<sup>101</sup> but it has been elaborated recently, with intelligence and eloquence, by Holmes, Brandeis, and Chafee.<sup>102</sup> These writers recognize that civil liberties are political privileges which have to be justified, like other privileges, on the basis of their contribution to human happiness. This realization marks a desirable intellectual shift from the essential arbitrariness of the natural-rights conception. Yet the shift is not so great as the alterations in language would imply. For the utilitarians in general seek a justification for civil liberties in the fulfillment of the individual's potentialities in a given society and mark their limits, not by the bright horizons of societal development, but at the point where liberties impinge and conflict. They seek the justification of freedom of speech

<sup>100</sup> "The Civil Liberties in the American Community," *Ethics*, vol. LI (October 1940), p. 1.

<sup>101</sup> For a statement of "utilitarianism," see Jeremy Bentham, *Fragment on Government* (1776), and *The Book of Fallacies* (1810). John Stuart Mill, *Utilitarianism* (1863); *On Liberty* (1859, reprinted Everyman, 1910), pp. 149-170.

<sup>102</sup> For Holmes, see, e.g., dissents in the cases of *Abrams* [250 U. S. 616, 627-628, 629-631 (1919)] and *Schwimmer* [279 U. S. 644, 654-655 (1929)]. For Brandeis, see his concurrence in the *Whitney* case [274 U. S. 357, 374-377 (1927)]. For Chafee, see *Free Speech in the United States*, *op. cit.*, pp. 31-35, 136-139, 559-561.

and the press, not in a concrete weighing of communal objectives and communal situations, but in an abstract, free-market liberalism in the realm of ideas.<sup>103</sup> To them the aim of social policy is truth, on which all progress depends; truth waits to be discovered by free competition in the market; and, in Milton's phrase, "Who ever knew Truth put to the worse, in a free and open encounter?" (Although Holmes did not have an absolute idea of truth, he reached the same result as the other jurists, thanks to his intellectual hospitality to contending points of view.)<sup>104</sup> Thus the public-utility approach, despite its communal phraseology, returns to an individualist foundation. And in this case "truth" itself has an individualist role akin to that assigned to the economic man in antimercantilist economics: truth can fend for itself in the market place if it is only freed from the sort of governmental restraints on expression against which Milton was contending. The outcome in practice, therefore, of utilitarian philosophy is laissez-faire grounded in expediency, as of natural-rights philosophy it had been laissez-faire grounded in quasi-theological principle.

The overlapping of these positions is very evident in the writings of Jefferson, who has come, perhaps more than any other American figure, to symbolize the civil-liberty tradition. Sometimes he spoke of freedom of speech and thought as natural rights anterior to government.<sup>105</sup> Often he defended freedom of the press as a public utility, as a purifier of differences of opinion,<sup>106</sup> or as a critic of government, as when he wrote: "where the press is free and every man able to read, all is safe."<sup>107</sup> Although he was well aware of the press abuses of his time, such as sensationalism, he believed that the government could not be trusted to discriminate between truth and falsehood, while, on the whole, the public could.<sup>108</sup> As a safeguard,

<sup>103</sup> Cf. Walter Lippmann, "The Indispensable Opposition," *Atlantic Monthly*, vol. 164 (August 1938), pp. 186, 190 ("tolerate error in order to serve truth").

<sup>104</sup> Compare, e.g., *Holmes-Pollock Letters*, *op. cit.*, vol. I, p. 105, vol. II, p. 29.

<sup>105</sup> See generally, Padover, *Democracy by Thomas Jefferson*, *op. cit.*, pp. 21-29.

<sup>106</sup> Letters to Benjamin Waring (1801) and to Pictet (1803), *ibid.*, pp. 58, 145.

<sup>107</sup> Letter to Colonel Yancey (1816), *ibid.*, p. 253.

<sup>108</sup> It is perhaps relevant to Jefferson's views that his own method of seeking truth or forming opinion was not by debates or in the press, but in an almost incredibly voluminous correspondence. See *ibid.*, pp. v, 1-2. Obviously, the process of letter writing is both personal and, in the days of handwriting, leisurely; nothing could be more remote from the mass-propaganda activities of the present day.

On Jefferson's optimistic view of the press, see, e.g., letter to Loray (1823), *ibid.*, p. 57; cf. letter to J. Norvell (1807), *ibid.*, pp. 149-150; letter to Elbridge Gerry (1801), *ibid.*, p. 145.

he demanded universal education, although he did not want to make it compulsory.<sup>109</sup> But he was enough of an economic determinist to fear that the growth of a wealthy class of traders and manufacturers would endanger American democracy. Although we find references to freedom of commerce and freedom of press juxtaposed in his writings as possessed of equal worth and dignity,<sup>110</sup> he was not thinking in terms of "big business," but rather of the simple economics of John Locke. In general, as has been so well advertised of late, Jefferson was hostile to government. "I own," he wrote to Madison, "I am not a friend to a very energetic government. It is always oppressive."<sup>111</sup>

#### THE NEED FOR A NEW ORIENTATION

Today this once revolutionary position has become conservative. The revolutionary impetus was allowed to burn itself out during the nineteenth century, while slogans drawn from the existing scheme of civil liberties have helped to defeat claims for new liberties on the part of workers and other underprivileged groups—claims that, had they won governmental recognition, would have vitalized the civil-liberty tradition.<sup>112</sup>

<sup>109</sup> See Notes on Virginia, Query 14, letter to Wythe (1786), Plan for Elementary Schools (1817), *ibid.*, pp. 133-135, 138. He also wanted wide distribution of newspapers, letter to Carrington (1787), *ibid.*, pp. 142-143. He was optimistic that knowledge would automatically lead to progress, in line with the eighteenth-century view. See, e.g., letters to Dr. Waterhouse (1818) and C. C. Blatchly (1822), *ibid.*, pp. 138, 141-142.

<sup>110</sup> See, e.g., letters to Humphreys (1789) and to Gideon Granger (1800), *ibid.*, pp. 23, 47.

<sup>111</sup> Letter to Madison (1787), *ibid.*, p. 36. Cf. letters to Dupont de Nemours (1816), to I. H. Tiffany (1816), to Madison (1787), *ibid.*, pp. 56, 34-35, 86-87.

<sup>112</sup> See R. L. Hale, "Coercion and Distribution in a Supposedly Non-coercive State," *Political Science Quarterly*, vol. XXXVIII (1923), p. 470, and "Minimum Wages and the Constitution," (1936) 36 *Columbia Law Review* 629; Charles Grove Haines, *The Revival of Natural Law Concepts* (1930), pp. 122-139, 144 *et seq.* Cf. Francis William Coker, "American Traditions Concerning Property and Liberty," *American Political Science Review*, vol. 30 (1936), p. 1; Walton H. Hamilton, "Property According to Locke," (1932) 41 *Yale Law Journal* 864. On the use of zeal for minority rights to cloak business interests, see Max Lerner, "Minority Rule and the Constitutional Tradition," in *The Constitution Reconsidered*, "op. cit.", p. 197.

It is illuminating to compare the German development, where liberalism does not seem to have been put to reactionary uses. Rudolf Sohm had warned: "From the circles of the third estate itself there have arisen the ideas which now . . . incite the masses of the fourth estate against the third. What is written in the books of the scholars and educators is nothing other than what is being preached in the streets." *Kirchengeschichte im Grundriss*, 20th ed. (n.d., 1st ed., 1867), pp. 216-217, discussed in Franz L. Neumann, *Behemoth* (1942), pp. 3-7. Germany, however, possessed an historic reservoir of feudal ideology which could be counterposed to a socialism which, as Sohm's remarks indicate, drew heavily on French

The mere passage of time, of course, does not render obsolete an attitude that once made sense. It is the changes that have occurred since the formulation of eighteenth-century individualist liberalism that impel its reexamination today. It is necessary to remind ourselves of these, familiar as they are. In Jefferson's time, the processes of opinion formation operated chiefly in informal and public meetings and through the press. The press was a rudimentary affair, involving small capital investment;<sup>113</sup> its impudent vigor reflected the success of its recent fight to free itself from governmental controls.<sup>114</sup> In the battle between Federalists and Republicans, both sides seem to have been fairly adequately served by organs of unconcealed partisanship.<sup>115</sup> At meetings, the belief in reason and the tradition of the town meeting were still sufficiently strong to compel public discussions to assume a more or less rational character. The distance we have come since that time can be measured by the fact that it would have been inconceivable then to have written, perhaps even to have noticed, as Hitler does in "Mein Kampf," that the evening is the best time for political meetings, since at the end of the day people are tired and most receptive to suggestion.<sup>116</sup> And as we all know, the press,<sup>117</sup> like the radio<sup>118</sup> and the movies,<sup>119</sup> has today become big business, ac-

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revolutionary doctrines, while in the United States opinion, both progressive and conservative, has drawn at least its verbal slogans from the tenets of liberalism. See further my review of Mims, *The Majority of the People*, *op. cit.*, in (1942) 27 *Iowa Law Review* 355.

<sup>113</sup> See Frank Luther Mott, *American Journalism, A History of Newspapers in the United States through 250 Years, 1690-1940* (1941), pp. 46-47.

<sup>114</sup> *Ibid.*, pp. 124-130.

<sup>115</sup> *Ibid.*, pp. 113-114. See also R. E. Park, "The Natural History of the Newspaper," *American Journal of Sociology*, vol. XXIX (1923), pp. 279-282.

<sup>116</sup> Adolf Hitler, *Mein Kampf* (ann. tr. 1940), pp. 710-711; on the supremacy of the spoken over the written word, the importance of mass meetings and mass suggestion, *ibid.*, pp. 704-716. See also F. A. Six, *Die Politische Propaganda der N. S. D. A. P. im Kampf um die Macht* (1936), pp. 37-40 (on the effectiveness of processions and parades).

<sup>117</sup> For an excellent article on the press, commenting on both the tendency to institutional unity and the extent and kinds of influence to which it is subject, see Dexter M. Keezer in *Encyclopedia of the Social Sciences*, vol. XII, pp. 325-343. See also Kingsley Martin, "Freedom of the Press," *Political Quarterly*, vol. IX (1938), p. 373; Norman Angell, *Why Freedom Matters* (1940), pp. 123-124; A. F. Whitney, "Labor Gets No Break in the Press," in *Freedom of the Press Today*, edited by Harold L. Ickes (1941), p. 286. On the divergence between public opinion and publishers' opinion during presidential campaigns, see Bruce Bliven, "Balance Sheet for American Journalism," in *Freedom of the Press Today*, p. 32; and *New York Times*, November 8, 1940, p. 1.

<sup>118</sup> See S. E. Frost, Jr., *Is American Radio Democratic?* (1937), pp. 79-81; Jerome Kerwin, "The Control of Radio," *Public Policy Pamphlets*, no. 10 (1934), p. 21; "Fifth Annual Report of the Federal Communications Commission, June 30,

cepting and articulating, in the main, the conservative viewpoints of the owners, though these are often concealed by an appearance of impartiality and "service." Advertising influences opinion both by pressure over those communication media which depend on advertising revenue,<sup>120</sup> and, more importantly, by setting communal standards of behavior which reflect themselves in public attitudes.<sup>121</sup>

While some of the American forerunners may have thought of opinion as an autonomous, individual growth, Madison and other economic determinists tended to the belief that occupation and economic status were controlling factors in political opinion. Neither position took adequate account of the complexities. Today we have become aware not only of the extent to which thinking and expression of thought are social processes, not an affair of individuals, but also of the many cultural factors in opinion formation which operate more or less independently of economic relationships.<sup>122</sup> The fine arts, the theories of intellectuals, the style and manner of public and private behavior—all these affect the emotional and imaginative sources of opinion.<sup>123</sup> As our understanding of these processes has grown, so has our manipulative ability. At the same time, the complexity of the issues facing public opinion is obviously greater than in Jefferson's time, making it well-nigh impossible for the average individual, by the exercise of common sense, to cope with the problems themselves, let alone with manipulative

1939: Monopoly Investigation in 1939"; "Federal Communications Commission, Report of the Committee Appointed by the Commission to Supervise the Investigation of Chain Broadcasting" (June 12, 1940), pp. 133-134. For comment, see C. J. Friedrich, "The FCC 'Monopoly' Report: A Critical Appraisal," *Public Opinion Quarterly*, vol. IV (September 1940), p. 526.

<sup>120</sup> See Leo C. Rosten, *Hollywood: The Movie Colony, The Movie Makers* (1941), pp. 61-63.

<sup>121</sup> See Bruce Bliven, "Balance Sheet for American Journalism," *op. cit.*, pp. 31-32; "usually the advertiser doesn't need to exert any influence because the publisher, who has the control, is himself very much the same kind of fellow as the advertiser. . ." See also Curtis C. MacDougall, *Newsroom Problems and Policies* (1941), pp. 224-234.

<sup>122</sup> Cf., e.g., Duncan MacDougal, Jr., "The Popular Music Industry," in *Radio Research, 1941*, edited by Paul F. Lazarsfeld and F. N. Stanton (1941), pp. 65-109.

<sup>123</sup> See, e.g., Talcott Parsons, *The Structure of Social Action* (1937); Karl Mannheim, *Ideology and Utopia* (Worth and Shils tr., 1936), and the discussion in Robert K. Merton, "Karl Mannheim and the Sociology of Knowledge," *Journal of Liberal Religion*, vol. II (Winter 1941), p. 125.

<sup>124</sup> Ernst Schachet's "The Dynamic Perception and the Symbolism of Form," *Psychiatry*, vol. IV (1941), pp. 79-96, suggests analogous historical investigations into cultural perceptions.

efforts. His own limited life experiences and contacts are no longer an adequate guide to him in threading his way through public controversy.<sup>124</sup>

The technique of reaction has also altered since the eighteenth century. Then it took the form of forceful repression of opinion. This did not work in the long run, as successive revolutionary movements demonstrated. The modern combination of technical skills and mass democracy has meant, moreover, that there is even less chance than before to control opinion by repressing it. A literate and articulate public has grown accustomed to discussion of public affairs, and the technological advances of machine industry have made that sort of public inevitable. Those same needs of industry mean that it is no longer possible to operate a political system without a mass base which is willing to produce goods and fight in highly technical armies.<sup>125</sup> As a result, reaction today does not leave a vacuum of opinion into which "dangerous thoughts" might find an entry no matter how tight the repressive controls. It creates, by behind-the-scenes manipulation, a favorable climate of opinion.<sup>126</sup> It uses words as weapons, rather than leaving words to its enemies and relying on force, as did the monarchical authorities in the period which saw the rise of the middle classes. Consequently the subservient population is no longer rebellious, but even becomes enthusiastic over its servitude. The new pattern is far more efficient, cheap, and safe.

The possibilities of enlisting mass support for this new reactionary tactic have been vastly increased by a phenomenon which those who carried the banners of liberalism in the eighteenth and early nineteenth centuries could never have expected.

<sup>124</sup> See Walter Lippmann, *Public Opinion* (1922), pp. 47-76, 398-410.

<sup>125</sup> There lies, too, the best "long-run" hope. Cf. Max Ascoli, "The World Civil War," *Twice a Year*, vol. V-VI (1940-1941), pp. 29, 39-40. Veblen constantly pointed out the rationalizing quality of modern industrial work. See *The Theory of Business Enterprise* (1904) and *The Engineers and the Price System* (1921).

<sup>126</sup> If the necessity of a new reactionary technique needed demonstration, the failure of the Kapp putsch in Germany in 1920 provided it. A general strike of the workers proved an adequate defense against this maneuver, on the Balkan or South American model, of a reactionary military clique possessed of guns but not of ideology. It became clear that only by securing some support from the workers and peasants themselves could reaction in Germany hope to succeed; hence, Hitler's movement, which called itself, among other titles, the "socialist workers' party" and which never had to face a general strike. See Felix Bernstein, "The Balance of Progress of Freedom in History," *Freedom, Its Meaning*, edited by Ruth Anshen (1941), pp. 145, 149, for a discussion of the failure of the Weimar Republic to mobilize opinion in its favor.

What has happened is that many social groups, after one hundred and fifty years of freedom from religious, feudal, or even state supervision, are anxious to go back to some secure and restricting fold where no choices or freedoms can be exercised. During the nineteenth century it had been assumed that all people wanted civil liberties, English style,<sup>127</sup> and that only mossbacks or politicians of ill will would ever wish to take civil liberties away. The price of liberty had been thought to be vigilance. But now cumulative forces not dissimilar to those that drove Hobbes into the *Leviathan*, or that drove insecure and frightened folk into the combination of sternness and evangelism of some of the Protestant sects, have created groups which cannot cope with freedom. Authoritarian characters, found in all walks of life but especially among the cramped lower-middle classes, that lack both the prestige of competitive success and the solidarity of union membership, wish to rule with an iron hand and to be ruled. For them the burden of individualism has become too great to bear, and the freedom of choice which liberal societies avow has either been illusory in their life experience because of their limited social and economic resources or it has been lost in aimlessness because no adequately pervasive value-scheme existed to serve them as a guide.<sup>128</sup> In Europe, these social groups wishing to escape from liberalism have been aided by feudal vestiges and mythologies that managed to survive four hundred years of history. They have been aided also by industrial monopolists who were frightened by the claims for new civil liberties on the part of workingmen and others, claims that capitalism and liberalism with its universal promises had given rise to.

We may smugly feel that fascism is a European form of this new tactic of reaction, which cannot happen in countries with a long liberal tradition and without a feudal past. But Americans have their own subtle and pervasive form of avoiding the full utilization of the civil liberties they theoretically possess. The standardized living for which Americans are noted affects not only mass-production industries and the

<sup>127</sup> For conservative acceptance of the English model in the eighteenth century, see Boorstin, *The Mysterious Science of the Law*, *op. cit.*, pp. 154-156.

<sup>128</sup> See Erich Fromm, *Escape from Freedom* (1941); Reinhold Niebuhr, *The Nature and Destiny of Man* (1941), vol. I, pp. 65-92; George Sawyer Petree, *The Process of Revolution*, Studies in Systematic Political Science and Comparative Government (1938), and my review, (1939) 51 *Harvard Law Review* 309.

ordinary articles of consumption; it affects the very centers of creativeness in thought and expression. Lacking traditional social barriers and any feeling for privacy, and avid for success, Americans are subjected to a terror of public opinion which imposes a certain uniformity on the geographic diversity and cultural disorderliness of American life. And so Americans, too, are self-repressed to some degree, often unconsciously, in fear on the one hand of "the neighbors" and "what people will think," and in hopes on the other of winning friends and influencing people. Of course these apparently petty and often anonymous forms of control are radically different from the vicious and open brutalities of Fascist *Gleichschaltung*. Yet the very fact that we are seldom made as dramatically aware of the repressive tendencies of public opinion as we are aware of the Gestapo and the Oggp helps to hide the long-run seriousness of our problem. When we add that this powerful force of public opinion is capable of manipulation by the same sort of monopolists who helped to bring Fascism to Germany, we may wonder whether vigilance alone is the extent of the price that must be paid for liberty today.

In the light of increased psychological insight and in view of the power and subtlety of the new methods of manipulation, many persons have become very skeptical of the free-market conception of truth.<sup>129</sup> They realize, in the first place, that an individual's "truth," no matter how true, has little chance for equality of bargaining power against the "truth," say, of the radio networks or the chain press.<sup>130</sup> In the second place, they suspect that in the situations which raise the typical civil-liberty issues, the truth involved is not ascertainable by a historical, rational search for a "correct" piece of information. It is more likely to be the truth of such opinions as that capitalism, or war, or the Nazis, are bad, or are on their way out, and that such and such ought to be done about it. "Such truth is not independent of the efforts of the contending parties and calmly awaiting its appropriate seeker, it hangs on the balance of the conflict in that, as the conflict is a practical one, either side can, in a very real sense, make itself true. The real issue is

<sup>129</sup> Compare Boorstin, *The Mysterious Science of the Law*, *op. cit.*, pp. 4-7.

<sup>130</sup> See Harold L. Elsten, "Mass Communication and American Democracy," in *Print, Radio and Film in a Democracy*, edited by Douglas Waples (1942), p. 10.

thus whether one side or the other or both are to be granted that opportunity."<sup>131</sup>

Indeed, it is probable that many of those who recognize these developments have carried their cynical distrust of reason and their naïve trust in the power of propaganda beyond what the facts warrant. They have experienced understandable, but excessive, reactions from the eighteenth-century faith in a God-given, intuitive reason and a Rousseauistic common will, and they are equally dubious whether there is any "truth," and if so, what difference it actually makes.<sup>132</sup> Both Marxian and Freudian influences have contributed to this result. For the Marxists, the process of reasoning has become class rationalism, and all ideology is a mere superstructure for the modes of economic production. For the Freudians, reason has all but vanished; it is a sublimation or rationalization of irrational, instinctual drives.<sup>133</sup> But what matters here, as everywhere, is not only the facts but the beliefs about them. So long as men see manipulation or rationalization where previously they saw the operation of divine inspiration or natural laws, public policy cannot rest securely on the traditions of the Enlightenment or the Utilitarians. And so, while some people have clung tenaciously to earlier patterns of liberalism, and others have fled from them into one of the many varieties of modern absolutist cults, vast numbers have given up in despair of a solution, though continuing to give lip service to liberty.

The reorientation of civil-liberty policy demanded by these changes in conditions and in our thoughts about conditions has been surprisingly laggard. The persistence of laissez-faire conceptions is an important factor. Just as big business has been able to marshal for the defense of its kind of "property" against

<sup>131</sup> D. Meiklejohn, "The Civil Liberties in the American Community," *Ethics*, vol. LI (1940), pp. 11-12. This is not to accept the utter relativism of Holmes's remark that "truth was the majority vote of that nation that could lick all others." "Natural Law," (1918) 32 *Harvard Law Review* 40; *Collected Legal Papers* (1920), p. 310. For a balanced view of "truth" which the author accepts, see M. C. Otto, *The Human Enterprise* (1940), chaps. iv, ix, and the acute and subtle analysis of Robert K. Merton in "Karl Mannheim and the Sociology of Knowledge," *Journal of Liberal Religion*, vol. II (Winter 1941), p. 125.

<sup>132</sup> For a penetrating analysis, see Carl Becker, "Some Generalities that Still Glitter," in *New Liberties for Old* (1941), pp. 124-151.

<sup>133</sup> These partial views are, like eighteenth-century liberalism, universalizations grounded in the needs of specific social groups in specific situations, Marxism in the needs of the "advanced" workers of the nineteenth century, Freudianism in the needs of the "emancipated" upper class of the twentieth. Cf. Niebuhr, *The Nature and Destiny of Man*, *op. cit.*, vol. I, pp. 49-53.

governmental interference most of our small farmers and businessmen who fear for their kind of eighteenth-century property, so the press and radio lords have been able to marshal for the defense of their kind of "freedom" most of our intellectuals who fear for their kind of Voltairean freedom.<sup>134</sup> Yet this is an incomplete explanation of the barrenness of much civil-liberty thinking today, for laissez-faire has been pretty well abandoned in economics save for those few of the Austrian School who have rejuvenated it in modified and sophisticated form.<sup>135</sup> The field of economics exhibits today an impressive amount of governmental and university research on questions of regulation and planning, research which is purposive and detailed. The want of a similar advance in civil-liberty theory is, I suspect, the product of a "cultural lag." Economic activity is more obvious to most persons than is ideological. When people starve in the midst of plenty, doctrinaire liberal or laissez-faire views of economic theory are not long permitted to interfere with their notions of what ought to be done—a conflict between folklore and behavior touched on amusingly by Thurman Arnold. Ideological starvation is never so evident. The Marxists have also contributed their share to this primacy of economics by labeling ideology a "superstructure" of no independent weight; in this they have reinforced with an elaborate system traditional American economic determinism and supported the typical American hostility to and contempt for intellectuals and their tools. "Sticks and stones can break my bones, but names can never hurt me."<sup>136</sup> It is only recently that the impressive power of Nazi propaganda as a military

<sup>134</sup> See, for able expressions of this viewpoint, Harry Shulman, "The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech," (1931) 41 *Yale Law Journal* 262; Henry Rottschaefer, "The Constitution and a Planned Economy," (1940) 38 *Michigan Law Review* 1133 (planned economy should entail greater antigovernmental safeguards for civil liberties).

<sup>135</sup> See, e.g., Ludwig von Mises, *Socialism, an Economic and Sociological Analysis* (1936). For criticism of the greater attention paid by liberals to freedom of international trade than to freedom of personal movement, see David Riesman, "Legislative Restrictions on Foreign Enlistment and Travel," (1940) 40 *Columbia Law Review* 793, 831-835.

<sup>136</sup> Compare the medieval proverb, "Krüt, stein unde wort diu ha'n an kraften grozen hort;" Hitler's belief [*Mein Kampf* (Munich, 1934), p. 116] in the "magic power of the spoken word which since ancient times has set the great avalanches of religious and political movements a-rolling;" and the suggestive comments of Henry M. Paechter, *A New Technique of Social Control: Magic Thought and Magic Grammar in Totalitarian Propaganda* (unpublished manuscript, 1942, 54 pp.). See also Eugen Rosenstock-Huessy, *Modern Man's Disintegration and the Egyptian Ka* (privately printed, 1941).

weapon has instigated a feverish attempt to master the ideological armory.

In general, the temper of our society emphasizes materialistic attitudes. The interest in ideas that was so intense in the religious epochs has to some extent disguised itself under these seemingly secular forms. But since we no longer take formal religion seriously,<sup>137</sup> and wonder how men could have killed each other over points of dogma—not seeing that the dogma involved a way of life,—we are inclined to treat with like scorn any fierce disputes over "mere" ideas.<sup>138</sup> "Practice" has become our religion, and "theory," where it can find shelter at all, must justify itself by instantaneous works rather than by faith. Although economics is, of course, a highly theoretical and sophisticated science, it has had the attraction of being somehow related to farms and factories; and it could get financial support from business, which thought that economists could solve its problems or justify its existence.<sup>139</sup> Problems of civil liberty only became tangible in some *cause célèbre*: when someone got jailed or was executed for his ideas. This fact has helped to give American discussion of civil liberties its largely legalistic cast, not the least reason for its sterility; for legalism—powerful in America even without dramatization in leading cases—has always tended to emphasize the existing law, particularly the more honorific law of the Federal Constitution. This concentration on the restrictive law of the bill of rights not only narrows civil liberties to their eighteenth-century base, but tends to focus attention on litigious techniques of protection against governmental interference. In addition, the sporadic nature of *causes célèbres* has allowed us to take civil liberties for granted save when they were openly challenged by the government, as in general we took democratic processes for granted until their recent challenge by totalitarians.

Obviously, however, the critical study of civil liberties, as of

<sup>137</sup> On American religious cults as a product of social strains, see Talcott Parsons, "Max Weber and the Contemporary Political Crisis," *Review of Politics*, vol. IV (January 1942), pp. 61, 75–76.

<sup>138</sup> For discussion of the pragmatic temper of American thinking and its dangers, see Becker, *New Liberties for Old*, *op. cit.*, pp. 96–123, "When Democratic Virtues Disintegrate," and for amusing comments on American positivism, see Sidney R. Gair, "This Mortimer Adler of Chicago," *Southern Review*, vol. VII (Autumn 1941), p. 298.

<sup>139</sup> For similar tendencies in the field of literature, see Philip Rahv, "The Cult of Experience in American Writing," *Partisan Review*, vol. VII (November–December 1940), p. 412.

anything else, must begin by refusing to take anything for granted. While we have assumed for years that economic activity was worthy of special study and elaborate statistical and institutional investigation, the study of the scientific substratum of the civil liberties of speech, press, and assembly, namely, semantics,<sup>140</sup> public opinion,<sup>141</sup> and propaganda, was thought until recently to require no specialists; it was an affair of common sense. While this sort of Philistinism has greeted every new field of academic inquiry, it has been particularly strong in this area, which deals with no material objects but with the words and other symbols which all of us produce or consume in our daily lives.<sup>142</sup> Yet the scientific investigation of these symbol data requires the sophisticated level of self-consciousness now attained by scholars about apparently obvious and well-understood activities like talking, reading, and holding meetings. Even here, there has been a materialistic tendency to concentrate on statistical investigations, particularly of methods of measurement of public opinion on a large scale. The subtle problems of the development of opinion,<sup>143</sup>

<sup>140</sup> "But indeed language has succeeded until recently in hiding from us almost all the things we talk about," I. A. Richards, *Principles of Literary Criticism* (1928), p. 21. For the contribution of semantics, see, e.g., S. I. Hayakawa, *Language in Action* (1941), with bibliography.

<sup>141</sup> For tentative beginnings, see "The Round Table on the Measurement of Opinion," *American Political Science Review*, vol. XIX (1925), p. 126. See for early work in this field, A. Lawrence Lowell, *Public Opinion in War and Peace* (1923) and *Public Opinion and Popular Government* (1913, new ed., 1926); Walter Lippman, *Public Opinion* (1922) and *The Phantom Public* (1925); John Dewey, *The Public and Its Problems* (1927); Charles Horton Cooley, *Human Nature and the Social Order* (rev. ed., 1922); Arthur N. Holcombe, *The Foundations of the Modern Commonwealth* (1923). See, for later work, John William Albright, *Public Opinion* (1939); H. L. Childs, *An Introduction to Public Opinion* (1940); H. D. Lasswell, R. D. Casey, and B. L. Smith, *Propaganda and Promotional Activities: An Annotated Bibliography* (1935), and supplements in *Public Opinion Quarterly*, compiled by B. L. Smith.

<sup>142</sup> For imaginative attention to the legal aspects of these problems, see Chafee's edition (1930) of Roscoe Pound, *Cases on Equitable Relief Against Defamation and Injuries to Personality*. See also Zechariah Chafee, "The Disorderly Conduct of Words," (1941) 41 *Columbia Law Review* 381; Leon Green, *Cases on Injuries to Relations* (1940).

<sup>143</sup> See, e.g., Floyd Allport, "Towards a Science of Public Opinion," *Public Opinion Quarterly*, vol. I (1937), p. 14. For a discussion of the factors which go into making public opinion, see Peter H. Odegard, *The American Public Mind* (1930), pp. 1-46. A suggestion for surveys of public attention to determine what is available, including content analysis, will be found in H. D. Lasswell, *Democracy Through Public Opinion* (1941), pp. 111-115. See also Jerome Bruner, "The Dimensions of Propaganda: German Short-Wave Broadcasts to America," *Journal of Abnormal and Social Psychology*, vol. XXXVI (July 1941), p. 311 (psychologically significant dimensions of variation in propaganda); Gardner Murphy and Rensis Likert, *Public Opinion and the Individual* (1938), pp. 159-160; Lewis Dexter, "An Attempt to Measure Change of Attitude," *Sociometry*, vol. II (1939), pp. 76-83.

and improvement of methods of discussion and debate,<sup>144</sup> the dynamic relation between "public" and "private" opinion<sup>145</sup> and between opinion and social and economic conditions and conditionings<sup>146</sup>—these have been pursued with less intensity, though highly relevant for public policy in the field of civil liberties.

#### TOWARD A PUBLIC POLICY

A positive approach to civil liberties must begin with a realization of complexity. It must see the problem in evolutionary, that is, dynamic terms. It must abandon the static simplicity of the private-rights *versus* public-utility dichotomy, as it must abandon the dichotomous formulae to which we run for intellectual security in the face of difficulties. One source of complexity is the fact that the civil liberties or claims for civil liberties about which controversy rages are both means and ends of human action. Freedom of speech, for example, is a "public utility" in that it is a means to the formation of democratic, or consensual, public policy, which is in turn a means to the end of human self-development and happiness. Freedom of speech is also a "private right" in that, as a form of social self-expression of the fully developed human personality, it is an end in itself. And happy and developed personalities are in turn both a means for achieving a good society and a sign of its existence. A further source of difficulty is that civil liberties do not automatically serve or represent these valid ends of human happiness in a social community. To take free speech again, it can serve the purpose of self-expression of a sadistic or masochistic sort. This may be subjectively pleasurable, but it is not a form of happiness which is tolerable in a decent community. Such perverted self-expression conduces to undemocratic public policy, as is obvious in the use of free speech by Nazis to injure the self-respect of their opponents and to

<sup>144</sup> See, e.g., a suggestion for a "clarifier" in public discussion, in Lasswell, *Democracy Through Public Opinion*, *op. cit.*, pp. 80-95.

<sup>145</sup> See, e.g., Arthur Jenness, "Social Influences in the Change of Opinion," *Journal of Abnormal and Social Psychology*, vol. XXVII (1932), pp. 29-34, and "The Role of Discussion in Changing Opinion Regarding a Matter of Fact," *ibid.*, pp. 279-296.

<sup>146</sup> See, e.g., Albig, *Public Opinion*, *op. cit.*, pp. 170-180, 199-213, on the importance and paucity of measurement of cultural and collective attitudes; Peter H. Odegard, "Social Dynamics and Public Opinion," *Public Opinion Quarterly*, vol. III (1939), p. 239.

attain power which is desired for its own sake. Such undemocratic policy leads in turn to the reinforcement of sadomasochistic trends within the personalities subjected to it. A public policy for freedom of speech or any other single civil liberty of like importance should therefore have as its goal the maximization of its valid uses and the minimization of its invalid uses.<sup>147</sup> How this is to be done, under the conditions of today, is a difficult, if not an intractable, question of method. It is additionally complicated by the need of harmonizing the existing civil liberties among themselves and among the competing claims for new liberties<sup>148</sup> and to meet with aggressive countermeasures the desire to escape from liberties.

This problem of harmonization is not to be solved by natural-rights philosophy nor by the constitutional legalism which was the heir of that philosophy. Neither technique can settle, for example, whether Henry Ford should be allowed to make antiunion speeches to his workmen.<sup>149</sup> Of course, for the private-rights school there is no problem here; free speech dogmatically prevails. For the public-utility school there is a problem, but it is dogmatically resolved also, by virtue of a laissez-faire, individualist attitude toward truth, as if the encounter between the "truth" of W. J. Cameron and the "truth" of one of Ford's workmen were the "free and open encounter" of the Miltonian rhetoric. What must be done where such a conflict is presented is to see it not only in terms of an abstract philosophic or constitutional argument, but also as part of a social struggle which cannot be decided without the community's making a choice of

<sup>147</sup> On duties correlative to "freedoms," see Dorothy Thompson, "On the Record," *New York Post*, April 11, 1941.

<sup>148</sup> A valuable attempt in this direction is made in Fosdick, *What Is Liberty?* *op. cit.*, pp. 154-180.

<sup>149</sup> *In re Ford Motor Company*, 4 N. L. R. B. No. 81 (1937) (revised 1939), (1939) 52 *Harvard Law Review* 970; "Recent Limitations on Free Speech and Free Press," (1939) 48 *Yale Law Journal* 54, 73-74. For a general discussion of employer freedom of speech under the Wagner Act, see Lewis Van Dusen, Jr., "Freedom of Speech and the N. L. R. A." (1940) 35 *Illinois Law Review* 409. See also Charles C. Killingsworth, "Employer Freedom of Speech and the N. L. R. B." (1941) *Wisconsin Law Review* 211-238.

For the public-utility justification for protecting Ford's rights, see the statement of the American Civil Liberties Union, March 1938, press release, January 7, 1941; on charges of suppression of Ford's rights, see *Business Week*, July 16, 1938, pp. 21-22, and *Fortune*, vol. XVIII (1937), p. 52. For a discussion of whether an employer's words can ever be "mere" speech or whether there is bound to be an appeal to workers' fear and necessity, see *In re Wm. R. Hearst*, 2 N. L. R. B. 530, 542-543 (1937); (1938) 7 *International Juridical Association Bulletin* 25, 35, 36; (1940) 8 *ibid.* 89; (1941) 9 *ibid.* 78; J. Warren Madden, "Old Liberties and New," 4 N. L. R. B. Release, No. 2169 (1939).

its social goals and of the methods it is prepared to use for their achievement.<sup>150</sup>

Unionization, like speech, is both a means and an end. Just as freedom of speech met specific needs for protest on the part of the middle classes who carried the banners of eighteenth-century liberalism, so unionization meets specific needs of the newer social class of workingmen. It is a means toward the aspirations, political and economic, of that class; it helps, as speech does, to form public policy. But it is also an end in itself, as one form of social community and solidarity. For men desire community quite as much as they desire individuality, and unionization is misunderstood if it is seen only as a response to economic necessities and if its role in the development of human dignity and social self-expression goes unrecognized. Just as feudal groups attempted to repress the exercise of freedom of speech and the press by rising middle-class groups, so these latter groups, once their fight was won, were inclined to be indifferent, if not hostile, to the claims of workingmen for a civil liberty meaningful to them. Unionization was repressed by criminal-conspiracy proceedings, limitations on picketing, and the labor injunction.<sup>151</sup> Today—testimony to the enhanced power of labor and its ability to write its claims into law—collective bargaining has received the stamp of legislative and constitutional approval which turns a claim for liberty into a *civil liberty*, as in the Norris-La Guardia and Wagner Acts and the Supreme Court decisions protecting picketing as a form of free speech.<sup>152</sup> And so the judgment in the *Ford* case must turn on a judgment of competing values, championed

<sup>150</sup> Cf. Carl Becker, *Modern Democracy* (1941), pp. 85-97.

<sup>151</sup> See Felix Frankfurter and Nathan Greene, *The Labor Injunction* (1930), on picketing, pp. 24-36; on conspiracy, pp. 2-5, 145; on the scope of labor injunctions and their enforcement, pp. 82-133; Selig Perlman and Philip Taft, *History of Labor in the United States* (1935), vol. IV, pp. 299, 151-152, 521-522; J. Louis Warm, "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation," (1939) 23 *Minnesota Law Review* 255-362; Calvert Magruder, "Fifty Years of the Development of Collective Bargaining," (1937) 50 *Harvard Law Review* 1071; David Riesman, "The American Constitution and International Labour Legislation," *International Labour Review*, vol. XXIV, pp. 123, 139-146; Paul F. Brissenden, "The Labor Injunction," *Political Science Quarterly*, vol. XLVIII, p. 413.

<sup>152</sup> See *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Carlson v. California*, 310 U. S. 106 (1940), *supra*, p. 42. On picketing under the rubric of free speech, see J. Silver, "Picketing as Free Speech," *American Labor Legislation Review*, vol. XXXI (1941), pp. 47-48; on implications of picketing as free speech, see William Murrish, (1941) 29 *California Law Review* 366. Compare C. O. Gregory, "Picketing and Free Speech," (1940) 26 *American Bar Association Journal* 709 (the court

here, in part, by different social classes, as well as on a practical appraisal of the concrete situation and of the sanctions available to the government and to the parties. As to the latter, space here does not permit the exhaustive inquiry required. As to the former, I would appraise the values served by unionization as, in our time, of equal worth with those served by speech, and as Ford's and Cameron's addresses to this particular audience of workingmen were not contributions, in my opinion, to public policy or to the speakers' personal self-development, I would have no hesitation in forbidding them, since they served to deter self-expression on the part of employees.

We cannot assume that, if we succeed in harmonizing the eighteenth-century goals which remain of enduring value—free speech and free association, particularly—with the newer civil liberties, such as collective bargaining, we shall have exhausted the dimensions of our problem. There must also be considered those vital claims for civil liberties which have as yet won little recognition from the organized community, such as the right to work, the right to full employment.<sup>153</sup> There must be considered those additional social goals which have seldom been pressed as claims for civil liberties, for example, free education for all or free opportunity for increased enjoyment of the arts. The final step is a ranking of all these possible and desirable freedoms in a hierarchy of values, in which the community, operating through its government and along private channels, enlarges some and curbs others. In that judgment it must be guided, within the limits permitted us by the historically conditioned alternatives, by a vision of what a good society would be like.

In this light, it is possible to see how partial are the tests

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should explicitly recognize picketing as a form of economic coercion rather than as "free speech.")

On the difficulties of expansion of civil liberties where constitutions and bills of rights are written documents, despite flexibility through interpretation, see Becker, *New Liberties for Old*, *op. cit.*, pp. 1-43, 76-95; Charles Merriam, *The Written Constitution and the Unwritten Attitude* (1930).

<sup>153</sup> For a legalistic appraisal of forces which protect or interfere with job tenure, see James P. Rowland, *The Legal Protection of the Worker's Job* (1937). For the suggestion that industry develop a form of organization in which management's responsibility will include concern for the worker's job, see Malcolm P. Sharp and Charles O. Gregory, *Social Change and Labor Law* (1939), pp. 65-77. See generally John H. C. Pierson, *Full Employment* (1941). Cf. Art. 163, 2 of the Weimar Constitution: "The opportunity of earning his living by economic work shall be afforded to every German. Insofar as suitable work cannot be found for him, he shall be provided with the necessary support . . ."

which civil libertarians have put forward to mark the bounds of governmental action, and the extent to which policy has been invigorated by the very general recognition among liberals that the Wagner Act and like measures are essential pillars for civil liberty in our time, both as providers of new liberties and as accessory devices for the safeguarding of old ones. Nevertheless, among many people the negative issue still retains primary importance. Not only is it the standard technique of privileged groups to direct attention in the name of civil liberties to the sins of democratic government. The Puritan self-doubts of Americans, the origin of the United States in protest against what was deemed the tyranny of George III, and the experience of more recent immigrants with governmental oppression in their native lands—all these persistent factors have prepared the ground for such a technique. Appeals of organizations like the American Liberty League and the League for Constitutional Government, even if they lose an immediate legislative battle, nourish the underlying antigovernmental fear and suspicion in the public mind. Moreover, in the United States the government has, on the whole, been weaker than the privileged groups, and particularly weaker than they in manipulating public opinion.<sup>154</sup> Because of the government's weakness and social distance and unimpressiveness, rather more than because of its undeniable sins, it has been a relatively safe scapegoat for the anti-authoritarian feelings that most Americans have, both as a result of cramping standardization and as a heritage of the rebellious tradition of 1776, the frontier, and the Johnny Rebs. Feelings of this sort cannot comfortably

<sup>154</sup> See James I. McCamy, *Government Publicity* (1939); Cedric Larson, "How Much Federal Publicity Is There?" *Public Opinion Quarterly*, vol. II (October 1938), p. 636. Compare, e.g., on the awareness and success of business in this connection, "Public Relations," in *Business Week*, January 23, 1937, pp. 32-36, and "Public Relations for Industry," *ibid.*, October 1, 1938, pp. 21-36. See also the address of Tom Girdler, Republic Steel chairman, at the 16th Annual Conference of the National Industrial Advertisers Association, when he declared that business today is "face to face with the necessity for building good will, not alone for sales but in order to preserve the very system of free enterprise under which we exist and do business." *Ibid.*, September 24, 1938, p. 14. See generally Bronson Batchelor, *Profitable Public Relations* (1938); Edward L. Bernays, *Crystallizing Public Opinion* (new ed., 1934), pp. 11-33, and *Propaganda* (1928), pp. 62-91; Ivy L. Lee, *Publicity* (1925), especially pp. 44-64. See, e.g., report on the National Electric Light Association propaganda activities in E. H. Gruening, *The Public Pays* (1931); on the use of public opinion and the press in strike breaking, see Robert R. Brooks, *When Labor Organizes* (1937), pp. 133-164; on relating "public relations" to actual communal needs, see Childs, *An Introduction to Public Opinion*, *op. cit.*, and Lasswell, *Democracy Through Public Opinion*, *op. cit.*, pp. 71-79.

be released against the parents, the teachers, the employers, the working associates who have actually engendered them and on whose good will prestige and security depend; but the pent-up hatreds can be directed without loss of social or self-approval—even with the social encouragement which is based on the foregoing factors—at the distant and yet dramatically visible "politician," at "that man in the White House," whose operations are felt to be mysterious and malign.

The concept which sees the problem of political power raised only by tension between "the individual" and "the state" fails to recognize that political power is not a monopoly of the state and that the enjoyment of civil liberties depends upon one's group affiliations and hostilities. What we see in the more or less democratic lands is neither a Lockian abstraction of individuals set off against the state, nor a totalitarian "state of the masses," in which the state and the masses are sometimes said to be fused. There again, the problem is more complicated. What we find is, in the Lynds' terminology, a complex of "persons-in-culture" in which institutions and people react upon one another in ways far too subtle for characterization in the dichotomy of "the individual" versus "the state."<sup>155</sup> Indeed, that is what is implied in our previous remark that thinking is a social process, not an affair of individuals. And as the "individual" is, except in biologic terms, a fiction, so is the "state;" what we can recognize are governments with varying degrees of power and preëminence, for which the word "sovereignty" is far too generalized a definition. In a democratic community there are many organizations which enlist the more

<sup>155</sup> See Robert Lynd, *Knowledge for What?* (1939), especially pp. 152–156. Both political science and social psychology have tended to emphasize the group nature of society. For political science, see e.g., R. M. MacIver, *The Modern State* (1926), especially pp. 3–8, 455–493, and *Society and Its Changes* (1931), pp. 52–243; Harold Laski, *Authority in the Modern State* (1919), pp. 19–122, and *A Grammar of Politics* (1925), pp. 28–35, 66–88; Frederick M. Watkins, *The State as a Concept of Political Science* (1934). Watkins discusses eighteenth-century liberalism as an attempt to reduce the total amount of coercive power in society and concentrate it in the state; see pp. 39–40.

For social psychology, see, e.g., John E. Boodin, *The Social Mind* (1939), pp. 23–129; L. L. Bernard, *An Introduction to Social Psychology* (1926), chaps. xxvi, xxix–xxxii; Kimball Young, *Social Psychology* (1930), chaps. ii, xii–xiii; Morris Ginsburg, *Psychology of Society* (1921), chap. iv; Lynd, *Knowledge for What?*, *op. cit.*, chap. ii. For a differentiated analysis, see H. D. Lasswell, "Person, Personality, Group, Culture," *Psychiatry*, vol. II (November 1939), pp. 533, 535–546. Compare also Jacques Maritain, *Scholasticism and Politics*, tr. Mortimer J. Adler (1939), pp. 67–80. See also, on the relation of personality and culture, Ralph Linton, *The Study of Man* (1936), pp. 464–487.

or less formal allegiance of their members in varying degrees of intensity and exclusiveness. The government is only one of these organizations, although peculiar in complexity of purposes and size. Any concrete civil-liberty situation will usually reveal a three-cornered fight, in which two private pressure groups are battling with each other and seeking governmental assistance, or at least governmental neutrality, while the state bureaucracy has often its own interest in the matter.<sup>156</sup> Only an approach tinted with pluralism can do justice to the variety of situations in which problems of civil-liberty character present themselves; in trade unions, corporations, universities, professional associations, and so forth.

A dramatic illustration is provided by the two *Nixon* cases<sup>157</sup> and *Grovey v. Townsend*<sup>158</sup> in the United States Supreme Court. In *Nixon v. Herndon* in 1927, the first case, the legislature of Texas forbade all negroes to participate in Democratic Party primaries; of course, nomination there is the equivalent of election. Nixon, a negro citizen, brought a suit for damages against the election officials who excluded him from voting. The Supreme Court sustained the suit on the ground that the statute was in conflict with the equal-protection clause of the Fourteenth Amendment. Immediately thereafter the Texas Legislature repealed the invalidated statute, giving "every political party in this State through its State Executive Committee . . . the power to prescribe the qualifications of its own members. . . ." Pursuant to this grant, the Democratic State Executive Committee resolved that only white democrats should be eligible for the primaries in 1928. Nixon, again refused the right to vote, again brought suit.

In *Nixon v. Condon* in 1932, a bare majority of the Court

<sup>156</sup> See, e.g., the story of the difficulties of the Hollywood local of the International Alliance of Theatrical and Stage Employees, involving union demands of workers opposed by the industry, opposition attempts to secure state and federal intervention, and racketeering within the union. Carey McWilliams, "Racketeers and Movie Magnates," *The New Republic*, vol. 105 (October 27, 1941), pp. 533-535. Another example is the use of syndicalism laws in struggles between capital and labor; see Perlman and Taft, *History of Labor*, *op. cit.*, pp. 430-431, 443. On the role of industrial groups, employers' associations, "class interests," and nationalist and patriotic organizations in the enactment of criminal-syndicalism legislation, see Dowell, *A History of Criminal Syndicalism Legislation*, *op. cit.*, pp. 51-63. See also reports of the LaFollette Civil Liberties Committee, under S. Res. 266, 74th Congress.

<sup>157</sup> *Nixon v. Herndon*, 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932); (1932) 32 *Columbia Law Review* 1069; (1935) 48 *Harvard Law Review* 1436.

<sup>158</sup> 295 U. S. 45 (1935).

upheld his claim, on the ground that the Executive Committee was acting here as the recipient of state authority, not of the authority of the members of the party, whose convention had not taken action on the subject of excluding negroes. The Committee therefore remained an official instrumentality, and was bound by the constitutional limitations on state action. Justice McReynolds, dissenting, insisted that the powers of the Committee did not derive from the state, but from "the essential liberty of party associations," like that of clubs or corporations. Following this decision, the State Democratic Convention in 1932 resolved "that all white citizens of the State of Texas . . . shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations." Grovey, a negro citizen, was refused a ballot in the 1934 primary; in *Grovey v. Townsend* in 1935, the Supreme Court unanimously affirmed a judgment denying him recovery for the refusal. Justice Roberts, writing the opinion for the Court, argued that the representatives of the party, in convention assembled, were not acting as the representatives of the state. He pointed out that although Texas laws elaborately regulated the conduct of primaries, the expenses were borne by the nominees, and ballots were printed and votes counted by the party. He relied on an earlier case<sup>159</sup> in which the Supreme Court of Texas had held that parties were voluntary associations and not creatures of the state, although the state was conceded a limited regulatory power. Justice Roberts concluded that Grovey's argument that he was virtually disfranchised confused "the privilege of membership in a party with the right to vote (in a general election) for one who is to hold a public office. With the former the state need have no concern. . . ."<sup>160</sup>

My object here is not to criticize the legal technicalities which rationalize such decisions as *Grovey v. Townsend* (other examples are given in a footnote),<sup>161</sup> but to underline the fact

<sup>159</sup> *Bell v. Hill*, 74 S. W. (2d) 113 (1932).

<sup>160</sup> 295 U. S. at 55.

<sup>161</sup> See *Civil Rights Cases*, 109 U. S. 3 (1883) (accommodations in hotels and theaters denied to Negroes); *Corrigan v. Buckley*, 271 U. S. 323 (1926) (Negroes denied ownership of land); *Plessy v. Ferguson*, 163 U. S. 537 (1896) (separate accommodations for white and colored persons in public conveyances), but see *Mitchell v. Interstate Commerce Commission*, 61 Sup. Ct. 873 (1941); *Berea College v. Kentucky*, 211 U. S. 45 (1908) (separate facilities in schools, public and private), but see *Missouri ex. rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Buchanan v. Warley*, 245 U. S. 60 (1917) (segregation of residences). See also William T. Garvin, "Civil Rights Statutes and Cases," (1941) 1 *National Bar Journal* 75.

that cynical antidemocratic feeling is born of wide disparities between the words of promise in our Constitution and the actual lack of freedom in the social milieu. In such cases, the distinction between private power, where voluntarism is relied upon to work freedom, and state power, which is curbed by elaborate constitutional checks enforced through litigation, makes a mockery of civil liberties.<sup>162</sup> Neglect of the need for governmental intervention to protect civil liberties does not, of course, spring inevitably from the clear and present danger test. Yet that test, and like restrictions on governmental action, often serve to divert attention from the main issues. What those issues are is obvious enough in the case of Grovey's "right" to vote. It is obvious, too, when freedom of assembly is denied in practice because it is difficult for unpopular groups to "hire a hall" for meetings;<sup>163</sup> when freedom of speech is denied by the conservatism of radio chains;<sup>164</sup> when freedom of thought is in effect denied by the difficulty of securing publication for deviant intellectual views.<sup>165</sup>

In all these situations, what counts is not the individual but

<sup>162</sup> See Robert Lee Hale, "Force and the State: A Comparison between 'Political' and 'Economic' Compulsion," (1935) 35 *Columbia Law Review* 149. For recent unsuccessful attempts to protect freedom from infractions by individuals under 18 U. S. C. § 51 (1924), see *Powe v. United States*, 109 F. (2d) 147 (1940) (press unprotected from blackmail conspiracy), (1940) 40 *Columbia Law Review* 902; cf. (1941) 1 *Bill of Rights Review* 145; *International Union of Mine, Mill and Smelter Workers v. Tennessee Copper Co.* (D. C. Tenn. 1940) 31 F. Supp. 1015 (unreasonable searches and seizures, invasion of free speech and press, unlawful arrest, and denial of bail during labor warfare); but see *United States v. Classic*, 61 Sup. Ct. 1031 (1941) (right to primary free from fraud), (1941) 41 *Columbia Law Review* 1101. The constitutional jurisdiction of the Federal government in these cases is reviewed by Henry A. Schweinhaut, head of the Civil Liberties Unit of the Department of Justice, in (1941) 1 *Bill of Rights Review* 206, discussing the unreported Harlan County conspiracy cases. On the expansion of the commerce clause to protect civil rights, see *Mitchell v. Interstate Commerce Commission*, 61 Sup. Ct. 873 (1941) (protection against discrimination); *Edwards v. California*, 61 Sup. Ct. 956 (1941) (freedom of movement); *National Labor Relations Board v. Jones and Laughlin*, 301 U. S. 1 (1937) (Wagner Act); *United States v. Darby Lumber Co.*, 61 Sup. Ct. 451 (1941) (Fair Labor Standards Act), (1941) 39 *Michigan Law Review* 1184. See memorandum from United States Attorney General's Office, reprinted (1941) 1 *National Bar Journal*, Appendix, urging that the Federal government in employing its commerce power must act with reference to the rights protected against state action under the Thirteenth, Fourteenth, and Fifteenth Amendments.

<sup>163</sup> See The American Civil Liberties Union, *The Right of Assembly* (1939). Even in cities where no permits were required for public meetings, police repeatedly broke up Communist meetings. For suggestion of a proposed bill to make meeting halls public utilities, see *The Legal Aspects of Freedom of Assembly*, Council for Democracy (December 1940).

<sup>164</sup> See *Broadcasting*, November 17, 1941, p. 16.

<sup>165</sup> Cf. Bernhard J. Stern, "Restraints upon the Utilization of Inventions," *The Annals*, vol. CC (November 1938), p. 13.

the strength of the group or groups to which he belongs.<sup>166</sup> Recognition of this fact, and also of the group nature of society, has led to demands for change in civil-liberty conceptions in order to implement, by governmental action, the right of groups to organize.<sup>167</sup> This right, like its specific application of unionization just referred to, is both means and end. Democratic policy is created by group rivalry and compromise; persons function and develop by grouping themselves about shared purposes and interests. On the other hand, the characteristic of totalitarianism is the destruction of all free professions and spontaneous groupings which interfere or compete with the dominant party, army, and business groups that share the power of the state.<sup>168</sup> In spite of this crucial quality of the right of free association for democracy, the formal recognition of the right has developed slowly. It was retarded by reaction from entrenched guilds and feudal orders<sup>169</sup> and by the individualistic shibboleths originally associated with democracy. While freedom of association depends on protection of meetings, it goes far beyond constitutional freedom of assembly which, in the American Bill of Rights, was directed at the need to protect meetings seeking the redress of grievances.

What is involved in these situations is first, the need for governmental supervision of the freedom of groups to form and to act within society, and second, protection of the members of the groups acting in relation to each other within the group structure. Without protection for organized pressure groups, the freedom to assemble and petition the government for redress of grievances would be a valueless right. However, since the freedoms of assembly and association can today be used and have been used for organizing totalitarian tyranny,

<sup>166</sup> See Louis Jaffe, "Law Making by Private Groups," (1937) 51 *Harvard Law Review* 201; E. P. Herring, *Group Representation Before Congress* (1929).

<sup>167</sup> For a thorough discussion of the right of association and its position in either a monistic or a pluralistic conception of the state, see Walter Milne-Bailey, *Trade Unions and the State* (1934), pp. 231-286. On the positive value of associations in a democracy, see Max Lerner, "Democracy with a Union Card," in *Ideas Are Weapons* (1939), pp. 517-528; John Dewey, *The Public and Its Problems* (1927), pp. 143 *et seq.*; I. Teller, *Labor Disputes and Collective Bargaining* (1940), pp. 225-234.

<sup>168</sup> See Emil Lederer, *The State of the Masses* (1940); *I. L. O. Studies and Reports, Series A (Industrial Relations)*, No. 28, "Freedom of Association" (1927), vol. I, "Comparative Analysis," p. 26. Hobbes, the great theorist of autocracy, recognized the need in a despotism for suppression of all voluntary associations.

<sup>169</sup> See Art. 1 of the French law of June 14-17, 1791, prohibiting professional associations, cited in Léon Duguit, *Traité de Droit Constitutionnel* (2d ed. 1925), vol. V, p. 615.

we are presented with the difficult problem of preserving valid uses of these freedoms and guarding against those twentieth-century invalid uses which have arisen to make the "rape of the masses" scientific. Vigorous governmental policy in the protection of free assembly and association cannot therefore be a generalized and "equal" protection of the laws for all associations,<sup>170</sup> without reference to the purposes of the particular association, any more than freedom of assembly can properly blanket assemblies of organized stormtroopers. Governmental policy must be selective and discriminating.<sup>171</sup> It must name the names of the groups needing protection, on the basis of an over-all judgment of the social forces which favor democracy, and the Wagner Act, as stated earlier, is one statutory recognition of that need.

But governmental policy must go beyond protection. It must see to it that there are facilities for the use of a right which otherwise remains in some degree theoretical. Where private enterprise does not provide meeting places for the impoverished and unpopular groups who are the only ones to raise a civil-liberty problem, the government must see to it that school-houses or courthouses, or if necessary private halls, are made available. Even that is not enough. The government, and willing private efforts, must help groups to form about mutual purposes, recreational, cultural, and, I would venture to suggest, even political, by active communal intervention, as settlement houses in a few neighborhoods now furnish catalysts for such grouping. No one, of course, needs to be forced into

<sup>170</sup> Undiscriminating liberal and legalistic deference to the concept of equality has its roots also in the law of nature. See John Locke, *Two Treatises on Civil Government* (1689), chap. ii. For discussion of the legal and historical background of the guarantee of "equal protection of the laws," see *Cummings v. Missouri*, 4 Wall. 271 (1866) (law directed at rebel clergymen and attorneys) and *Ex parte Garland*, 3 Wall. 333 (1866) (oath of past loyalty to the Union required of attorneys). Cf. *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63 (1928) (the statute excepted from its operation certain named, oath-bound societies). But cf. the attempts to deport Harry Bridges by name. See letter of Attorney General Jackson to Senator Russell, Chairman of the Senate Committee on Immigration, reported in *New York Times*, June 20, 1940, p. 12. See also the report of the Bill of Rights Committee of the American Bar Association (1940).

<sup>171</sup> The futility of legislation which is not sufficiently specific is illustrated by the recent Foreign Agents Registration Act, 22 U. S. C. A. 233(a) (1939). See *The Administration of the Foreign Agent Registration Act*, Report no. 3, Institute of Living Law (1941). See also the experience under the Voorhis Act (registration of subversive societies), cited in Gibbons, "Recent Legislative Attempts to Curb Subversive Activities in the United States," (1941) 10 *George Washington Law Review* 104, 123.

groups. But since no one can be truly free all by himself, he is likely, if the culture patterns favor it, to be a "joiner." It will take, I think, governmental activity to make joining possible for the underprivileged, particularly urban, masses who so largely lack the energy, knowledge, and resources for self-organization.<sup>172</sup>

The increasing importance of group activity carries as a corollary the need to protect and create liberty within the confines of the group, as well as in the relation of the group to other groups in society. In an article on the internal affairs of voluntary associations, Professor Chafee dealt with the possibilities of judicial protection of individual and minority rights within groups.<sup>173</sup> He found the courts reluctant to interfere in such "private" matters, except in cases of the most outrageous abuse, and not always even then. Courts were likely to treat such associations as labor unions or trade associations like the social clubs that they formally resembled. But governmental protection of the *formation* of labor unions, and of the action of unions as organized groups in the social process (as recognized in collective bargaining, or in the appointment of union officials to Defense Councils, the Mediation Board, and other agencies), makes it necessary to move into the group itself to protect the liberty of its members. Consequently, with the increase in union organization and the growth of the closed shop, the problem of liberty within the trade union has received increasing attention, much of it, of course, the disingenuous attention of labor haters. Professor Witmer's article on judicial controls is a notable instance of the sort of study needed.<sup>174</sup> According to the analysis made in this paper, the protection of liberty

<sup>172</sup> On the proportion of men and women without any affiliations (running up to 78 per cent among unskilled labor), see Mirra Komarovsky's forthcoming monograph, *Voluntary Associations*, reporting studies conducted in New York City. See also R. S. and H. M. Lynd, *Middletown in Transition* (1937), pp. 274-276, 466 (on the needs of the working class for clubs); George A. Lundberg, Mirra Komarovsky, M. A. McInerny, *Leisure; a Suburban Study* (1934), chap. v.

<sup>173</sup> Zechariah Chafee, "The Internal Affairs of Associations not for Profit," (1930) 43 *Harvard Law Review* 993. For an able discussion of English experience, see Milne-Bailey, *Trade Unions and the State*, *op. cit.* See also *I. L. O. Studies and Reports*, *op. cit.*, vol. I, pp. 30, 38-39, and Nos. 29-32 for individual studies.

<sup>174</sup> "Civil Liberties and the Trade Unions," (1941) 50 *Yale Law Journal* 621. See also Millard Breckenridge, 9 *Duke Bar Association Journal* 62 (validity of a closed-shop agreement embracing an entire union). See also Sharp and Gregory, *Social Change and Labor Law*, *op. cit.*, pp. 146-175, and David McCabe, "Government Control of Labor Representation," *Review of Politics*, vol. III (October 1941), p. 479, dealing with the degree of governmental control involved in the N. L. R. A., particularly with reference to selecting the bargaining unit.

within the union must be governmental to be a *civil liberty*, although nongovernmental protection, for example by international unions of freedom within their respective locals, is a microcosmic imitation of the problems presented at the governmental level.

Freedom of the press as usually espoused is protection against the government. Freedom for people who write for the press is only that provided indirectly by the Wagner Act, which was upheld in its application to the press in the A.P. case, despite the contention that "freedom of the press" was violated.<sup>175</sup> Freedom within business corporations generally appears as a problem in stockholder control and minority stockholders' rights; the S.E.C. represents a vitalizing of public policy in this area, previously left to the individualism of curative judicial action. The trusteeship concept of corporate directorship has civil-liberty overtones which go beyond questions of private property. The concept involves the rights not only of various classes of security holders *inter se*, but the rights of employees, consumers, and others within the sphere of the corporate enterprise, broadly viewed. There we have largely claims for liberty as yet not manufactured into legislative policy.<sup>176</sup>

This is obviously but the barest sketch of the group areas where an aggressive public policy might substitute new liberties for the vanishing liberty of atomistic individuals. But we must go beyond these more formal groupings to see the problem of intragroup liberty in its totality, just as we must not be content with the existing groupings in the intergroup field. We must enter the small private domains where civil liberties can affect the day-to-day living of most of us. When we enter them, we are dealing with social issues which are not recorded, indexed, and articulated for the easy investigation of legal and political scholarship. We go into homes and ask about the actual liberties of women, still our largest underprivileged minority.<sup>177</sup> We ask whether, despite the legal and formal

<sup>175</sup> *The Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1936). See Kingsley Martin, "Freedom of the Press," *Political Quarterly*, vol. IX, pp. 373, 387-388, on the necessity for organization and professional independence among journalists, both for themselves and as a protection for community service.

<sup>176</sup> See (1936) 49 *Harvard Law Review* 1369; cf. Walton H. Hamilton, Book Review of Dimock and Hyde, *Bureaucracy and Trusteeship in Large Corporations* (1940), in (1942) 55 *Harvard Law Review* 551.

<sup>177</sup> See Floyd Allport, *Institutional Behavior* (1933) pp. 358-377. See also Sara Louise Buchanan, *The Legal Status of Women in the United States of America*,

equality which they achieved in the heyday of liberalism, women are today treated as participating adults and regard themselves as such within the family circle and in their social and business lives.<sup>178</sup> We go into grammar and high schools, which seldom give rise to the *causes célèbres* of academic freedom, and ask whether teachers and children are free<sup>179</sup> free of pressures toward unthinking orthodoxy from school boards and principals,<sup>180</sup> from the clergy, from patrioteers and business men, from authoritarian parents and gangs of dead-end kids. We try to discover what the existing formal scheme of civil liberties means among the unorganized, among farm labor, among white-collar workers.<sup>181</sup>

Some indications concerning these queries are to be found in the work of the Lynds, Dollard, Warner, and others.<sup>182</sup> Some clues as to nonparticipation are given by the percentages of "don't know" responses to public-opinion polls. Careful attitude testing would give other clues. If we define our goal for civil liberties in terms of participation of persons in the life of active social groups, and of participation by those groups in general community affairs, it is evident that the available data do not encourage optimism. Only a frontal attack on the inequalities and insecurities of our society will create the social soil in which civil liberties, either old or new, can flourish.

I have spoken of groups and left aside momentarily the problem of leadership within groups, with its complications for civil liberties. The problem of leadership was never integrated

*January 1, 1938* (United States Department of Labor, Women's Bureau, 1941); and for South America, *Derechos Civiles y Políticos de la Mujer* (Inter-American Commission of Women, 1933).

<sup>178</sup> See, e.g., Winifred Holtby, *Women and a Changing Civilisation* (1934), pp. 97-115.

<sup>179</sup> See Howard K. Beale, "Freedom for the School Teacher," *The Annals*, vol. CC (November 1938) pp. 119-143; on freedom of college students, see James Wechsler, *Revolt on the Campus* (1935). See also *What Freedom American Students?* (Committee on Academic Freedom, American Civil Liberties Union, April 1941); *What Freedom New York Schools?* (American Civil Liberties Union, February 1934); Alexander Meiklejohn, "Teachers and Controversial Questions," *Harper's Magazine*, June 1938, pp. 15-22, reprinted by American Civil Liberties Union.

<sup>180</sup> See Howard K. Beale, *A History of Freedom of Teaching in American Schools* (1941), pp. 235-264, 264-268 (sources of pressure and effect on freedom of curtailment of school budgets). See also Lynd, *Middletown in Transition*, *op. cit.*, pp. 233-238.

<sup>181</sup> See Stuart Queen, "Can Sociologists Face Reality?" *American Sociological Review*, vol. VII (1942), pp. 1, 8-9.

<sup>182</sup> See, e.g., Lynd, *Middletown in Transition*, *op. cit.*, pp. 37, 233-238; W. Lloyd Warner, Buford H. Junker, and Walter A. Adams, *Color and Human Nature* (1941); John Dollard, *Caste and Class in a Southern Town* (1937).

with the Jeffersonian liberal attitude. The American Revolutionists were likely to think in terms of the Greek city-state or the New England town meeting, where leaders were neither specially selected nor specially trained, but served temporarily and then returned to their private pursuits. Alexander Hamilton was exceptional in thinking in terms of a permanent administrative corps; his contemporaries thought that such a corps smacked of monarchy and was inconsistent with civil liberty. The tradition developed that strong executive leadership was dangerous, and civil libertarians devoted themselves to attempts to weaken it—in the political realm by constitutional checks, and in the business world by trust busting and governmental regulation. The liberal goals were freedom from tyranny, from "bureaucracy," from "dictatorship." Here also a liberal policy that was at one time progressive no longer holds out promise of advance. The liberty to be free from planned leadership becomes frustrating once the frontier era has passed. Now it means either an anarchic public policy in which the strongest and most ruthless individuals and economic groups win out, or a reaction against anarchy into totalitarian dictatorship. In modern society, weakness of democratic leadership leads inevitably to authoritarianism.<sup>183</sup> Strong leadership means that desired policy will be executed. The problem is to make the policy a shared and democratic one by the encouragement of critical and creative relationships between leaders and public,<sup>184</sup> and that in turn depends on a public opinion which is nourished by civil liberties. But for that nourishment we cannot depend on the competition of truth freed from governmental restraints. Nor is it enough for the government to protect free expression by protecting existing private groups against one another. The government here also must go beyond protection and by repeated revaluation of democratic goals create the conditions under which speech can have real meaning. It must assist in the creation of an unintimidated public opinion. Partly this can be done by indirection through

<sup>183</sup> See Arnold Brecht, "Constitutions and Leadership," *Social Research*, Vol. I (August, 1934), p. 265 (on the failure of the Weimar Constitution to provide for strong leadership on a parliamentary basis).

<sup>184</sup> On training competent leaders, see Harold D. Lasswell, *Democracy Through Public Opinion* (1941), chap. ix. On the informal consent of the governed as one of the assumptions of democracy, see Charles Merriam, *The New Democracy and the New Despotism* (1939), especially pp. 38–45, 104–188, and *The Role of Politics in Social Change* (1936), chap. v.

the strengthening of groups such as unions which, whatever their own defects, serve as a partial counterweight to the influence of business on opinion. Partly the administration must act directly to educate the community in the meaning of democracy and civil liberty.<sup>185</sup>

It is controversial whether advances in administration and in social psychology have yet made it feasible to attempt governmental regulation of opinion frauds.<sup>186</sup> But I do feel that we know enough now to inaugurate a program of governmental education to bring ideas to those sections of the population now deprived of them either by monopolistic control of agencies of communication or by ignorance, in the same manner as the Surplus Commodities Corporation now supplies healthful food to underprivileged groups who cannot buy in the "free" market (even the carefully regulated market of hygienic supervision).

I do not think that I underestimate the difficulties of governmental action of this sort. It is never easy to pass and enforce legislation which will be worth more than its cost. This follows not only from the administrative difficulties that attend the implementation of any public policy, but from the fact that democratic government is not an abstract thing but a representative of, or compromiser among, the varying social groups within the community. It may be captured by groups hostile to civil liberty, and the history of its actions in the civil-liberty field during and after the last war is anything but encouraging for the future.<sup>187</sup> Though the difficulties and dangers of action by the government are thus patent, the need and the possibilities for its action are not so evident. We have often failed to realize the social consequences of the abuse of freedom in the past—abuse which has laid men open to the poison of fascist doctrine and behavior. We do not see that many men are not prepared for the use of freedom and will not be prepared without affirmative governmental action. We only dimly realize

<sup>185</sup> See David Riesman, "Government Education for Democracy," *Public Opinion Quarterly*, vol. V (June 1941), pp. 195-209.

<sup>186</sup> See Max Lerner, "Freedom in the Opinion Industries," in *Ideas Are Weapons* (1939), p. 13 (suggesting a T.V.A.); Lewis Dexter, "Regulation of Fraud in the Opinion Industry," (unpublished manuscript, 1940, 8 pp.); Morris Ernst, *Proceedings of the National Conference on Civil Liberties in the Present Emergency* (1939), p. 16 (suggesting an S. E. C. to prevent anonymity in public speech and press).

<sup>187</sup> See, e.g., the moving biography by Walter Nelles, *A Liberal in Wartime* (1940).

that we are confronted with a crisis for civil liberties of greater magnitude than, in our utopian confidence in the long-run triumph of truth over abuse, we have been willing to admit.<sup>188</sup>

In the obvious crisis presented by a war, as we saw, and under the war-peace test, liberals have been willing to make temporary concessions to the assumed needs of victory. The "violent overthrow of government" statutes indicate a common belief that a government may properly act in order to save itself from the equally obvious crisis of immediate violent catastrophe. The clear and present danger test, as interpreted by some of its expounders, also permits governmental action *in extremis*. Underlying all these formulae and attitudes is a feeling that we are confronted only by temporary obstacles to freedom. Such a concept of crisis or emergency refers to an all-enveloping, but temporary, national catastrophe: usually war, occasionally domestic violence or natural disaster, like floods and earthquakes. In this reference, a distinction is drawn between what may lawfully or constitutionally or ethically be done at all levels of governmental action in an "emergency" as compared with "normal" times.

Frederick Watkins, in a brilliant essay in the first volume of *Public Policy*,<sup>189</sup> outlined a theory of constitutional dictatorship as a method of defending the Constitution in a period of temporary crisis. His analysis does not identify crisis with international war or natural "Acts of God." On the contrary, it is based on a study beginning with the downfall of the Roman Republic and ending with an investigation of the attempt to apply measures customarily associated with dictatorship to the defense of Weimar Germany. It raises also the legal questions which Anglo-American law tends to bypass under the heading of martial rule or martial law. Watkins believes that these historical experiences indicate the necessity of sometimes constitutionally suspending certain guarantees in order to preserve the main core of constitutionalism. Although I recog-

<sup>188</sup> See, for a well-known recent analysis of the crisis of liberalism and democracy, Karl Mannheim, *Man and Society in an Age of Reconstruction* (1940). See also Paul Tillich, "Freedom in the Period of Transformation," in *Freedom: Its Meaning*, edited by Ruth Anshen (1940), pp. 123-144.

<sup>189</sup> "The Problem of Constitutional Dictatorship," *Public Policy*, vol. I (1939), pp. 324-379. See also Frederick M. Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (1939); C. J. Friedrich, "Constitutional Dictatorship and Emergency Powers," *Constitutional Government and Democracy*, *op. cit.*, pp. 235-251, and the appended bibliography.

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nize the value of Watkins's work, I am inclined to feel that even his concept of emergency, improved as it is over traditional ones, leans somewhat too heavily toward the temporary side. He is thinking in terms of civil war or of obvious disorder, as in the late years of Weimar Germany. Yet the problem of civil liberties that confronts us seems to me neither temporary in these ways nor permanent: it is transitional. Nationalism, capitalism, liberalism are in the crucible; it may take years before a new amalgam of social forces emerges which can give promise of some stability and peace.

An emergency concept, to do duty in this situation, can perhaps be related to doctrines which were developed by lawyers and economists to justify public control of business under the Constitution. This concept drew a distinction between industries where a "normal" free market rendered governmental regulation unnecessary, and therefore invalid, and industries where monopolistic situations or practices interfered with the free market and created an "emergency" crying for governmental interference.<sup>190</sup> In the former, laissez-faire, the assumed norm of public policy, prevailed; in the latter, the exceptional case, the industries that could legitimately be regulated included those we know as public utilities—railroads, pipe lines, power and light companies—and a few additional ones such as the milk business, where the free market had broken down in obvious disorganization.<sup>191</sup>

It is an emergency of this latter sort that I believe exists in the field of civil liberties. There, too, monopolistic and unsocial practices have made laissez-faire unworkable, in the face of an almost complete lack of organization among the consumers of ideas. There, too, the welter of conflicting beliefs, in the absence of education in the process of selection and evaluation, has created a disorganized market. One's general attitude on how to deal with this emergency depends ultimately, as do all questions of politics, on the character and extent of one's faith in man's capacities for intelligence and for good will. If we are to avoid the authoritarian solutions which spring from despair or from fear or hatred of the masses, democrats must be fully

<sup>190</sup> This is fully discussed in Walton H. Hamilton, "Affectation with a Public Interest," (1930) 39 *Yale Law Journal* 1089. See also Dexter M. Keezer and Stacy May, *The Public Control of Business* (1930).

<sup>191</sup> See *Nebbia v. New York*, 291 U. S. 502 (1934).

aware of the strength of the social forces which have paralyzed man's potentialities.<sup>192</sup> We must then use governmental power aggressively to combat these forces and to excavate and strengthen latent social forces which favor man's development. This is the program that is required in this period of transition. It cannot succeed unless we are willing to recognize the desperate emergency that is called fascism long before it reaches the level of a constitutional or international crisis. For we must not be lulled by the fact that fascism, in its early stages, is undramatic. Like a flood, it begins in general erosions of traditional beliefs, in ideological dust storms of long ago, in little rivulets of lies, not caught by the authorized channels.

<sup>192</sup> For a study which is both an investigation of actual conditions and a reexamination of the ideals of democracy, see *Freedom of Inquiry and Expression, The Annals*, vol. CC (November 1938), edited by Edward P. Cheyney, and especially the forthright liberalism of Cheyney in "Freedom and Restraint: A Short History," *ibid.*, pp. 1, 10-12.

## THE ADMINISTRATION AND CIVIL LIBERTIES IN WARTIME

*Alan Burr Overstreet*

WHEN President Roosevelt, in his Message to Congress of January 3, 1940, said ". . . national unity is, in a very real and deep sense, the fundamental safeguard of democracy,"<sup>1</sup> he was expressing an exceedingly important element of the basic philosophy of the national defense, and, more recently, the war effort. The Administration's ostensible point of view is that the maintenance and safeguarding of democracy is the first concern of the government.

In order to protect democracy, says the President, national unity must be achieved. Almost all Americans are agreed that this is the goal; that a vigorous defense of democracy by a unified people is the most effective way in which to counter the threat of both foreign and native totalitarianism. The entry of the United States into the present World War has brought a valuable amount of national unity insofar as the ultimate objective is concerned, but we still disagree volubly as to the meaning of national unity in relation to domestic problems and the methods to be used in achieving such unity.

Does "national unity" mean the imposition and enforcement from above of a rigid uniformity which permits of no dissent, no opposition to the acts and policies of the Federal government? Does "national unity" allow only "criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government?"<sup>2</sup> Or, on the other hand, does "national unity" imply the achievement, on a voluntary and democratic basis, of widespread agreement as to the acts and policies necessary to implement a strong war effort, while at the same time preserving as much as possible of the essential and traditional diversity of American life through a firm protection of our civil liberties?

This dichotomy as presented may suffer from oversimplification.

<sup>1</sup> *Vital Speeches*, vol. VI, no. 7 (January 15, 1940), p. 196.

<sup>2</sup> Justice Van Valkenburgh, in *United States vs. Rose Pastor Stokes*, Bulletin of Department of Justice, no. 106, 12 (W. D. Mo., 1918).

tion, nevertheless, it presents the basic problem in relation to civil liberties confronting the Administration at the present time. Are civil liberties luxuries to be shelved in time of crisis in the interests of national unity? Or are they necessary and essential prerequisites to the attainment of unity and the maintenance of democracy during and after the war?

#### THE NATURE OF THE PRESENT CIVIL-LIBERTIES PROBLEM

"Civil liberty is a concept, basic to modern political thought, which in its most general usage connotes the freedom of the individual with respect to personal action, the possession and use of property, religious belief and worship, and the expression of opinion. This freedom is conceived to imply a right to protection against both governmental and private interference, but it is essentially a right of the individual as against the authoritarian state."<sup>8</sup>

Broadly speaking, Mr. Cushman's definition of civil liberty leaves little to be desired. The kernel of his definition lies in the last phrase: ". . . a right of the individual as against the authoritarian state." This telling phrase serves as a starting point for our own discussion, for we are here concerned with the rights of individuals and of individuals gathered together into groups as against the power of government—local, state, or Federal—exercised during a time of severe crisis.

These rights are expressed above in general terms. They are more specifically enumerated in the Amendments to the United States Constitution. The listing in the Constitution, however, does not by any means exhaust the list of rights implied by the term "civil liberties." In addition, there are the rights provided for in specific statutory enactments, such as the Civil Rights Acts of 1870, and the Wagner Act, which establishes the right of labor to organize and bargain collectively. There are also various specific rights which have been established by judicial interpretation. There may be room for disagreement as to the precise nature of these rights; nevertheless, their general outlines are sufficiently clear for the purposes of this discussion. It must be remembered, however, that civil liberties, while often considered in terms of the rights of the individual, are basically a relationship between these desirable

<sup>8</sup> Robert E. Cushman, article on "Civil Liberties," *Encyclopedia of the Social Sciences* (New York, 1930), vol. III, p. 509.

rights of the individual and the necessities of the society of which the individual is a part. Absolute civil rights, broadly speaking, cannot exist in a society in which the wisdom and value of the authority of government is recognized. Concern with civil liberty must, therefore, be a matter of attention to the *degree* of liberty which exists under any given government and the *tendency* of that government to restrict, maintain, or extend existing liberties.

It is when we consider the *protection* of these rights under governmental power that we strike to the heart of the problem. These are rights guaranteed to each individual by the self-limitation and self-restraint of the government, except where the enjoyment of an individual's civil liberties is challenged or denied by the action of other individuals, in which case the government merely fills the role of an impartial arbiter upholding existing laws. In both cases, however, the government is the only agency which can enforce the protection of these rights.

In times of crisis it is quite possible that the government may not only be found lax in its police-power protection of individual rights against invasion by individuals, but it may also deliberately abandon its own self-restraint and disregard or circumvent its own self-limitation. Historically this has frequently been the case.

If such action is taken moderately and deliberately, in accordance with a clearly stated governmental policy approved by the legislative representatives of the people and in general (though this is exceedingly difficult to determine with accuracy) by the major portion of public opinion, there is probably little ground for immediate protest. In time of war the curtailment of civil liberties by those in authority is to a certain extent dictated by the necessity for functional military efficiency. Such curtailment can be justified if it is adopted with full recognition and common acceptance of its desirability. If, during and after the war, there is still an opportunity for minority opposition to find expression through the exercise of the ballot, a policy which involves the narrowing of civil liberties can in time be reversed within the democratic process.

But if the power of a government is used to pursue a policy involving the restriction or invasion of civil liberties without that policy having been clearly enunciated and subjected to

public scrutiny, and without its having received the necessary legislative and popular approval, then it would seem that that power is being used in an arbitrary and undemocratic manner, and there are good grounds for vigorous protest. If the curtailment of civil liberties during wartime is imposed by high officials without any opportunity for public approval or disapproval, then the very objectives of a war for a free world are being denied and the ground is being prepared for a possible betrayal of the people.

#### LOCAL, STATE, AND FEDERAL CONCERN WITH CIVIL LIBERTIES

In the preliminary remarks above, "government" has been treated as a single element concerned with the protection of civil liberties. This is not entirely incorrect when speaking in general terms. But on specific examination we discover that abuses and violations of civil liberties have resulted in many cases from the fact that the protection of civil rights is not the sole affair of either local, state, or Federal governments. Each is concerned with certain civil liberties to a greater or less degree, but no one of them is charged with full responsibility for the protection of all these liberties. Thus the United States Department of Justice has been forced to emphasize the fact that it is "without power to accept for prosecution a great number of complaints falling within the category of civil liberties."<sup>4</sup>

<sup>4</sup> Henry Schweinhaut, "Federal Criminal Enforcement of Civil Liberties Statutes," an address before the Institute of Public Affairs, Charlottesville, Virginia, June 21, 1940. Mr. Schweinhaut, the Chief of the Civil Liberties Unit of the Department of Justice, pointed out that the bases for Federal action lay largely in the "due process" clause of the Fourteenth Amendment, and Sections 51 and 52 of Title 18, United States Code (the Civil Rights Act of 1870). Section 51 makes it a Federal offense for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. It should be noted that this statute has certain very definite limitations: it is a conspiracy statute, and therefore not available where the offense is committed by a single individual; it refers to the rights of a "citizen," hence is not applicable in cases concerning aliens, political groups, or associations; and in order to maintain a prosecution successfully the Federal government must prove beyond a reasonable doubt that the deprivation of rights was the *purpose* of the conspiracy, not merely an incidental consequence.

Section 52 provides for the punishment of public officers who, under color of law, statute, ordinance, regulation, or custom, willfully subject any inhabitant to the deprivation of rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. Clearly this statute is somewhat broader than the conspiracy statute: it applies to all inhabitants, hence includes aliens as well as citizens; and it can be violated by a *single* official, hence there is no

During and immediately following the first World War this meant that the actions and policies of the state and local law-enforcement agencies were frequently at wide variance one with another, and also at variance with the Federal government's actions and policies. All were guilty of denying individuals and groups their civil rights and failing to protect them in the enjoyment of their rights under the excuse of "emergency conditions," but there were marked variations of degree resulting from the absence of any unified policy.

While Attorney General Gregory in 1918 said that his department "throughout the war has proceeded upon the general principle that the constitutional rights of free speech, free assembly, and petition exist in wartime as in peacetime, and that the right of discussion of governmental policy and the right of political agitation are most fundamental rights in a democracy,"<sup>5</sup> at the same time the American Protective League, an organization of some 250,000 volunteer quasi-official spy chasers, set up by the Department of Justice as an auxiliary to the Secret Service, engaged in numerous invasions of civil liberties in direct denial of the policy enunciated by Gregory.<sup>6</sup>

Gregory's successor, Attorney General A. Mitchell Palmer, who took in office in March, 1919, denied his predecessor's policies by engaging in the notorious "Red Raids" of 1919-20. These mass arrests were carried on in flagrant violation of even the most basic civil liberties and with an appalling disregard for ordinary justice. They were characteristic expressions of the vigilante spirit and mass hysteria of which the American people were guilty during the immediately prewar and postwar periods and during the war itself.

But while the Federal government was guilty of an inconsistent, wavering policy and of at times condoning or encouraging repressive acts which were not in accord with its

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necessity to show conspiracy—at best a difficult legal task. But this is an untested statute; appellate courts have been called upon to construe it only twice. The meaning of the phrase "under color of law" has not yet been judicially determined. Further, it is incumbent upon the prosecutor to establish the "willfulness" of the deprivation of rights. Thus negligence or indifference on the part of a judge, a county attorney, or a sheriff might deprive a prisoner of due process of law, yet action under Section 52 would not be possible because intention to deprive could not be established.

<sup>5</sup> B. W. Patch, "Civil Liberties in War Emergencies," in *Editorial Research Reports*, vol. II, no. 15 (October 15, 1940), p. 290.

<sup>6</sup> J. L. O'Brian, "Civil Liberties in War Time," *Report of the New York State Bar Association*, vol. XLII, p. 304.

policy of the moment, the state and local governments were far more guilty. Examples of hysterical vigilantism and mob rule winked at and unchecked by state and local authorities are far too numerous to list here. In contrast to the negativism of negligence or indifference, whether willful or inadvertent, there was also the frequent presence of official repressive action of a positive sort, such as the denial to several Socialists, duly elected, of the right to serve as legislators. This official repression was frequently utilized by particular economic-interest groups to achieve ends affording greater economic advantage to the members of the group, without any real reference to the necessities of preparedness or the war effort—though this was put forward as a blanket excuse.

Throughout this period the courts served as an inadequate check. Unaided, they were insufficient to guarantee protection of civil liberties, and in many cases the lower courts "were swayed by the same hysteria which tended to obliterate the concern of other departments of the government for the preservation of liberties."<sup>7</sup> The various Federal statutes passed during 1917–18, such as the Espionage Act, the Trading With the Enemy Act, and the Sedition Act, were broadly interpreted and harshly applied. State legislation paralleled to some extent the Federal legislation, but often went beyond it, notably in the Criminal Syndicalism Acts of the war and immediately postwar periods.<sup>8</sup> And this state legislation, too, was interpreted so that gross violations of civil liberties resulted.

These errors of the past have not gone unobserved. The officials of the present Administration, especially those in the Department of Justice, have taken full note of the World War experience.<sup>9</sup> Having learned the lesson, they are exerting strenuous efforts to avoid a repetition of that black story.

<sup>7</sup> C. B. Swisher, "Civil Liberties in War Time," *Political Science Quarterly*, vol. LV, no. 3 (September 1940), p. 330. It should also be noted that "the Supreme Court did not pass upon the issues until after the Armistice was signed, and therefore did not make itself felt in the midst of the crisis." *Ibid.*

<sup>8</sup> Idaho in 1917 passed the first Criminal Syndicalism Act. By 1920, 20 states had such laws. There were in addition anti-sabotage, anti-war-opposition, anti-red-flag laws, etc.

<sup>9</sup> I am indebted to many officials in the Department of Justice for much of the information contained in this paper; especially Assistant Attorneys General Rotnem and Collins, Assistant Director of the Federal Bureau of Investigation Nicols, Solicitor General Biddle (now Attorney General), and Messrs. Holtzoff, L. M. C. Smith, Allen, and Duggan. They are, of course, in no way responsible for any of the opinions or interpretations here expressed.

At the same time, they lose no opportunity to point out the limitations on Federal action resulting from the division of powers between the state and Federal governments. These limitations are recognized as having been disturbing factors in the last war, and at the same time it is emphasized that to a large measure they still exist as a barrier to Federal control.<sup>10</sup>

The most important aspects of the civil-liberties problem high-lighted by the World War experience are the confusions and injustices resulting from (1) the division of powers between the state and the Federal governments, (2) the absence of a single national policy, and (3) the tendency of local groups and government officials under the impact of mass hysteria to be overzealous, overpatriotic, and even less concerned with the protection of civil liberties than the Federal government.

As Mr. Schweinhaut points out, "perhaps the primary limitation . . . is the fact that the right invaded must be a *Federal* right—not a right inherent in state citizenship or secured by state laws."<sup>11</sup> And as has been indicated, Federal rights are few and circumscribed. Federal statutes offer no protection "against violence by the ruffian, the vigilante or the mob, whether directed against Reds, Nazis, Negroes, Jehovah's Witnesses, Jews or Catholics or the soapbox shouter," except in the rare instances where a Federal right secured against individual action is invaded. This exception covers such cases as that of the Harlan County coal miners, where vigilantes could be shown to have *conspired* to deprive employees of their rights under the National Labor Relations Act.

Therefore, at the present time the Federal government must perform concern itself legally (*i.e.*, under the provisions of Federal statutes) largely with questions involving aliens, civilian espionage, home guards, labor rights, public order, military disaffection, political minorities, religious minorities (including conscientious objectors under the Selective Service Act, and religious objectors to the compulsory flag salute), sabotage, radio censorship, and the censorship of military information. The broader rights of freedom of opinion and the instruments of opinion, freedom of assembly, and the other enumerated constitutional rights are at the moment subjects of

<sup>10</sup> Wendell Berge (Assistant Attorney General), "Civil Liberties During National Emergency," an address delivered at the Foreign Policy Association Forum, October 25, 1941.

<sup>11</sup> Schweinhaut, *op. cit.*

primary Federal concern only from the legal point of view, insofar as they are specifically involved in statutes and law enforcement dealing with the questions listed above. The distinction between *acts* made illegal by statute and *opinions* is especially important in this connection. Legally the protection of these broader rights is still primarily the concern of state and local governments.

But despite these legal limitations on Federal action and despite the restricted field of Federal concern with civil liberties, the present Administration is not unmindful of the whole scope of the problem. It is precisely because the members of the present Administration have realized the importance of the lessons of the last war that they are, in this war, treating the civil-liberties problem on a much wider basis than their official, legal concern would warrant.

The general realization among officials of the Federal government, from the President down (and especially among the members of the Department of Justice) that civil liberties are inseparably connected with civilian morale and wartime efficiency has resulted in an effort on the part of these officials to take steps that will prevent a recurrence of the confusion and abuses of the last war.<sup>12</sup> This they are attempting to accomplish through a program of centralization of control of all civil-liberties protection, accompanied by the establishment of a uniform civil-liberties policy.

#### ADMINISTRATION PLANS FOR CENTRALIZED CONTROL OF THE CIVIL-LIBERTIES PROBLEM

The first move toward the creation of an effective centralization of policy and administration came immediately following the outbreak of the initial European phase of the present war.

<sup>12</sup> The close connection between the protection of civil liberties and the maintenance of civilian morale is repeatedly emphasized. For instance:

Attorney General Jackson: ". . . we must permit no tampering with our civil rights, for the first break in that bulwark will provide the opening wedge for those who seek the breakdown of our democratic system; . . . we must prevent lawlessness and mob violence, for by destroying law and order we create the confusion in which the 'fifth column' thrives. . . ." ("A Program For the Internal Defense of the United States," an address before the Mid-Summer Meeting of the New York State Bar Association, Saranac, N. Y., June 29, 1940, p. 16.)

President Roosevelt, "Message to the Federal-State Conference On Law Enforcement Problems of National Defense," Washington, D. C., August 5, 1940; and Solicitor General Biddle, "Civil Liberties and the War," an address before the Junior Bar Conference, Philadelphia, Pa., September 10, 1940.

On September 6, 1939, the President directed that "all Federal agencies dealing with civil defense during peacetime be co-ordinated under the Department of Justice."<sup>13</sup> By this order he placed the Federal Bureau of Investigation of the Department of Justice in charge of all "investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations."<sup>14</sup>

The Civil Liberties Unit of the Department of Justice, established on February 3, 1939, by Attorney General Murphy,<sup>15</sup> was supplemented after the outbreak of war by the establishment of a Neutrality Laws Unit under Mr. L. M. C. Smith, charged with the preparation and prosecution of all criminal cases involving violations of the Federal neutrality laws. By an order of May 23, 1940, effective June 14, the Immigration and Naturalization Service and the Border Patrol were transferred

<sup>13</sup> Attorney General Jackson, address before the Federal-State Conference on Law Enforcement Problems of National Defense, Washington, D. C., August 5, 1940, p. 1.

<sup>14</sup> The President's Directive of September 6, 1939, was described in a statement by the President, on the same date, in these terms:

"The Attorney General has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations.

"This task must be conducted in a comprehensive and effective manner on a national basis, and all information must be carefully sifted out and correlated in order to avoid confusion and irresponsibility.

"To this end I request all police officers, sheriffs, and all other law-enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities, and violations of the neutrality laws."

Three items should especially be noted here: (1) the fact that the FBI is charged only with *investigative* duties (criminal prosecutions are carried on by the various Units of the Criminal Division of the Justice Department, and the decision as to whether or not to prosecute rests with them, not the FBI—though the FBI has a large measure of choice in the matter of which cases to investigate), (2) the emphasis placed by the President on the "national basis" of this work, and the appeal to state and local law-enforcement officers, and (3) the discrepancy between the enumeration in the first paragraph of the various matters to be investigated by the FBI and the third paragraph, where "counterespionage" and "subversive activities" have been introduced. Because the precise meaning of "subversive activities" is by no means clear (especially as it is used by such zealots as the members of the Dies Committee), this introduces an unfortunately questionable note.

<sup>15</sup> The Order (No. 3204) creating the unit described its functions as follows: ". . . to make a study of the provisions of the Constitution of the United States and Acts of Congress relating to civil rights with reference to present conditions, to make appropriate recommendations in respect thereto, and to direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals." It is now known as the "Civil Rights Section." Department of Justice *Press Release*, June 17, 1941.

from the Department of Labor to the Justice Department<sup>16</sup> so that problems concerning aliens might be more efficiently handled.

By these and other steps the President hoped to effect an increased degree of centralization within the Federal government. It was evidently hoped that this in itself would be sufficient to solve the problem at hand. But events proved otherwise.

Even during the comparatively quiet phase of the war before the attack on France and the Low Countries, hysteria and vigilantism were growing in the United States. The fall of Norway and the sensational articles by Leland Stowe revealing the purported activities of a Nazi "Fifth Column" in Norway<sup>17</sup> gave the people of the United States a profound scare. "Fifth columnists" were discerned on every hand. A strange person or a person holding a viewpoint different from one's own became to many a "fifth columnist."<sup>18</sup> The Dies Committee capitalized on the publicity value of the term—and increased the state of hysteria—by making a clever propaganda transfer, whereby all those proscribed by the Committee—Nazis, Fascists, Communists, "Communazis," "fellow travelers," "fronts," "transmission belts," etc.—immediately became "fifth columnists" and were justly or unjustly cursed by having the heightened suspicion of the American people turned against them.

By May 23rd the situation had become so acute that Attorney General Jackson felt impelled to join other government leaders in issuing a statement designed to reassure the jittery American people.<sup>19</sup> Reassuring statements implying that the entire situation was well under control came thick and fast; almost every address by officials of the Department of Justice

<sup>16</sup> An excellent treatment of the purposes and implications of this transfer is contained in Solicitor General Biddle's address, "The American Alien," broadcast over the NBC network, June 16, 1940.

<sup>17</sup> These charges have subsequently been effectively refuted, at least in large part, by Carl J. Hambro, the President of the Norwegian Parliament, in *I Saw It Happen in Norway* (New York, 1940).

<sup>18</sup> For a good discussion of this see the *Bulletin* of the Institute of Propaganda Analysis, "The 'Fifth Column,'" July 8, 1940, vol. III, no. 9.

<sup>19</sup> Jackson's statement is noteworthy because it brings out many important points (italics mine):

"The President anticipated and prepared to meet 'Fifth Column' activities in the United States many months ago. It was obvious that these activities could not be dealt with on a local or voluntary organization basis, and the Federal Bureau of Investigation was enlarged and the President asked law-enforcement agencies everywhere to cooperate with the Bureau."

emphasized the point that there was "nothing to fear save fear" (though there is some question as to whether the profusion of statements did more to calm or agitate the people. The belligerence of some addresses would certainly seem to be more conducive to extreme alarm than to the creation of a feeling of reassurance!)

But the war developments conspired against the reestablishment of public equanimity. The fall of France and the Low Countries was followed by wild rumors—not yet fully confirmed—of "fifth column" activities as a contributory factor. Coupled with the sudden wide publicity given to the activities of our own fascist splinter groups, this news caused an inordinate increase in popular fear.

Fear, alarms, hysteria began to give rise to vigilante action, mob action, all over the country. Stringent local and state laws were passed as "protective" measures against fifth columnism. The provisions of state constitutions guaranteeing civil liberties were disregarded.

Aliens in particular were under suspicion. At the end of May 1940, Governor Rivers of Georgia ordered the registration and fingerprinting of all aliens in that state and the revocation of

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"It is obvious that the Department of Justice cannot and should not reveal its information, or the nature of the measures it has taken or is taking or the precautions it has used or is prepared to use against 'Fifth Column' activities.

"There need be no doubt, however, that the Federal Bureau of Investigation has capably, zealously, and effectively carried out its task, and will continue to do so. If need appears the Bureau will be enlarged to meet it.

"While 'Fifth Column' activities cannot be dealt with on a local or voluntary organization basis, citizens may be helpful to the Government. They may aid by reporting to the Federal Bureau of Investigation acts, threats, or evidence of sabotage, espionage, or other disloyal activities.

"Citizens will also help if they refrain from joining any organization . . . until they are fully acquainted with its nature.

"Lastly, the greatest help to the Government that citizens can render is to *keep cool and not become frightened*. Sensational statements as to the 'Fifth Column' should be received with suspicion. As in most matters, persons with real information and responsibility measure their words. Sensational statements and their makers should be discounted."—*Press Release*, May 23, 1940, and April 11, 1941.

Again note the insistence on the national and non-local nature of the problem and the necessity for reporting *directly* to the FBI. This latter point is repeatedly emphasized by J. Edgar Hoover, Director of the FBI, in his addresses, for instance: ". . . report directly to the FBI any complaints or information. . . . It is unfortunate that in a few states efforts have been made by individuals not fully acquainted with . . . this problem to interject superstructures of agencies between local law enforcement and the FBI to sift what might be vital information, thus delaying its immediate reference to the FBI. This cannot be. . . . This is no time for red tape or amateur handling. . . . There must be a direct and free flow of contact between the local law enforcement agencies and the FBI." Address, August 5, 1940.

business, occupational, or professional licenses held by aliens,<sup>20</sup> despite the invalidation by a Federal court of a 1939 Pennsylvania statute requiring the registration of aliens.<sup>21</sup> The invalidation was on the firmly established ground that all matters pertaining to aliens "are incident to national—not state—sovereignty."<sup>22</sup> Other states adopted or proposed similar alien-control measures.<sup>23</sup>

Nor were aliens the only ones whose liberties were threatened. Labor groups, political minority groups (notably Communists, Socialists, and Bundists), religious minority groups (especially the Jehovah's Witnesses), and innumerable individuals, suspect for one reason or another, were subjected to anything ranging from discrimination to outright mob violence.<sup>24</sup> Nor were the local and state governments the only ones which succumbed to the general state of alarm. A flood of restrictive bills were introduced in Congress, and many of them were passed, notably the Alien Registration Act, with its "sedition clauses."<sup>25</sup> At the time of the passage of this Act, attention to the obvious benefits of the alien-registration plan (which has since proved to be a piece of highly valuable legisla-

<sup>20</sup> Patch, *op. cit.*, p. 301.

<sup>21</sup> Davidowitz vs. Hines, 30 Fed. Supp. 471. This decision is based on the famous case of *Truax vs. Raich*, 238 U. S. 33 (1915). See in this connection the letter from Acting Attorney General Biddle to Governor Prentice Cooper of Tennessee, Department of Justice *Press Release*, July 8, 1940, which emphasizes the national nature of alien control.

<sup>22</sup> In an attempt to circumvent this limitation the Attorney General of Georgia asked the legislature to start a movement for the amendment of the Federal Constitution to withdraw from aliens enjoyment of the privileges and immunities guaranteed to citizens and held by the Supreme Court to extend to aliens. Patch, *ibid.*

<sup>23</sup> California: alien fingerprinting; New Jersey: anti-foreign-uniforms law; etc. Most of these are mentioned in the various pamphlets and publications of the American Civil Liberties Union, especially their *Civil Liberties Quarterly*, *Press Service*, and annual report *In the Shadow of War: The Story of Civil Liberty 1939-40*.

<sup>24</sup> In addition to the A.C.L.U. publications mentioned above, an extensive list is given by R. W. Dunn, *The Bill of Rights in Danger* (New York, 1940); also see the monthly International Juridical Association *Bulletin*.

<sup>25</sup> These bills are far too numerous to list here. Outstanding are: Voorhis Bill (registration of foreign agents), Walsh military-disaffection bill, Hobbs detention-camp bill (defeated in the House of Representatives, 167-141, November 18; *PM*, November 19, 1941, p. 7), Dempsey subversion bill. Section 1 of Title I of the Alien Registration Act deals with military disaffection, while Section 2 deals sweepingly with certain seditious and subversive acts. The Minneapolis and St. Paul Socialist Workers Party case is the first testing of this latter section. The case has been appealed to the Supreme Court and the validity of the extensive powers which this act grants to the Federal government will rest upon the decision of that body. Until final judicial determination of this case is made, however, the Department of Justice is pursuing its "test-case" policy and wherever possible holding the prosecution of other cases in abeyance.

tion) obscured the dangers to civil liberties inherent in the vague and all-inclusive phraseology of the sedition clauses.

Throughout this period of mounting hysteria the Department of Justice was following all developments closely and laying the groundwork for action which would go beyond the coördination of Federal agencies started by the President's Order of September 6, 1939.

The Department of Justice prepared a daily "Press Digest" during July and August, listing all press despatches concerning "espionage, sabotage, civil liberties, alien registration, and related matters."<sup>26</sup> This "Press Digest" strengthened the conviction of the Justice Department officials that some additional vigorous action was necessary to check the hysteria and to draw local, state, and Federal law-enforcement agencies together under the guidance of a unified public policy. The Department officials initiated, therefore, discussions on the question of how best to declare this public policy and to gain the support and adherence of local and state groups.

In the course of these discussions a proposal was made for a Federal-State conference on law-enforcement problems in connection with national defense. Most of the higher officials of the Department were reluctant to start such a conference. They felt that it would not be sufficient to check the hysteria or effect the desired centralization of policy and administration. The Attorney General, however, highly favored such a conference and urged that it be held, even though it might run the risk of failure. His views, approved by the President, finally prevailed, and during July 1940 the preliminary organizational work started.

The first problem which had to be overcome was the possibility that the common objection might be raised that this was a move toward "dictatorial" centralization, aimed at overriding the powers of state and local groups and placing all power in the hands of the Federal government. If this objection should be raised and if it should gain popular credence—especially with a Presidential election less than four months away—the entire value of the conference might well be destroyed. There-

<sup>26</sup> Mimeographed for official use only. An examination of these "Press Digests," at the Justice Department in Washington, revealed that they ran about ten pages in length daily, listing about fifty items. Perhaps three quarters of the items dealt with violations of civil liberties, proposals for restrictive legislation, or charges or rumors of "fifth column activities."

fore, the Department of Justice chiefs made use of a technique which would seem to all observers to be thoroughly democratic. It got in touch with various state groups, including the Governors' Conference, the Council of State Governments, the National Association of Attorneys General, and the Interstate Commission on Crime, and proposed that they sponsor a joint conference.

The response was favorable, for many of the state groups had been feeling the need for such a conference, and by July 15 the announcement came<sup>27</sup> that the four state groups were sponsoring the conference with the "coöperation of the Department of Justice." The veil of voluntary coöperation had been effectively cast about the conference and the charge of "dictatorship" forestalled.<sup>28</sup> The value of the conference was not to be destroyed by its becoming political capital, campaign fodder.

#### THE FEDERAL-STATE CONFERENCE ON LAW-ENFORCEMENT PROBLEMS OF NATIONAL DEFENSE

The purpose and plan of the Federal-State Conference was outlined on July 15 (see footnote 27). The following topics were to be discussed with the ostensible aim of promoting "better understanding" and "coöperation":<sup>29</sup>

1. Protective and preventive measures and policies relating to properties essential to national defense.
2. Treatment of espionage, sedition, propaganda, mob violence, violations of civil liberties, interference generally with effective operation of law enforcement and national defense program; civilian coöperation.
3. Treatment of aliens, their registration and their position in the community and industry.
4. Methods for considering and exchanging proposals regarding administrative coöperation and new legislation.

<sup>27</sup> From the Department of Justice *Press Release*, July 15, 1940.

<sup>28</sup> It is not desired here to imply that the voluntary coöperation was solely a ruse or an attempt to mislead, for undoubtedly much genuine coöperation was present and contributed importantly to the success of the conference, yet it seems clear from the available evidence that the initial impetus for the conference came from the Federal government and not from the state groups.

<sup>29</sup> The preliminary program cautiously states: "We emphasize that the Conference is designed to work out a plan of coöperation but it is not designed to commit any of the participants to particular courses of action." This remark is rather contradictory and somewhat meaningless both in view of the purpose of the Conference and its results. *Press Release*, July 15, p. 2.

5. Public education to secure general coöperation between Federal and state governments and citizens with respect to the aforementioned objectives.

It was an ambitious program, embracing a discussion of many of the questions pertaining directly or indirectly to the protection and maintenance of civil liberties. The detailed recommendations on all of these points will be treated later.

It is on examining the list of Federal and state governmental agencies actually represented at this conference at its meeting in Washington on August 5th and 6th, that the real extent of the coordination made possible can be discerned. The participating organizations listed in the *Program* include the four state-group sponsors mentioned above, "in coöperation with the Department of Justice." Each section meeting lists by name two chairmen, in all cases state Governors, and several discussion leaders, in all cases either members of the four sponsoring groups or United States Senators. The listing of participants in the section meetings invariably ends with the vague phrase: "Representatives of the Department of Justice." These "representatives" are nowhere specifically identified.<sup>30</sup> This passion for anonymity is quite in keeping with the persistent efforts made throughout the conference by the Department of Justice to remain hidden in the background and not to appear before the public eye as boss of the conference.

In addition, however, to these openly listed participants, there were present at the section meetings representatives of the army, navy, state, and local law-enforcement agencies, Army Corps Area Commanders, the United States Treasury Department, the National Defense Advisory Commission, and the American Bar Association Committee on National Defense. These men were not merely present as experts on call, they participated in the discussions and presented the viewpoints of the agencies they represented, yet their presence was even less publicized than that of the Justice Department officials. It is quite understandable that army and navy and other official representatives should take part in a conference discussing problems of national defense, but the soft-pedaling of their

<sup>30</sup> Save in the list of participants in the General Session preceding the Section Meetings, where the Attorney General, John Lord O'Brian, and J. Edgar Hoover are specifically named.

participation suggests an attempt to obscure the true centralizing character of the conference.

As far back as 1939 the Federal government had decisively turned its back on coöperation with "civilian spy" vigilante groups.<sup>31</sup> The American Protective League experience of the World War was not to be repeated. The trend of policy indicated was a clear determination to work only through existing law-enforcement agencies, even in time of emergency, and was clearly in accord with the Administration's general policy in the national defense effort. It was crystallized and openly declared at the Federal-State Conference, insofar as it related to law enforcement.<sup>32</sup>

In addition, the Conference established firmly the policy of a coördination of local, state, and Federal agencies led by the Federal government. This, however, was not so openly declared. Public opinion seemed quite ready to accept coöperation, but it was not nearly so ready to accept outright centralization under Federal leadership and control, hence the elaborate efforts to obscure the role of the Federal government in the conference. It is debatable whether or not public opinion is now ready to accept without protest the knowledge of such centralization, but the trend clearly seems to be in that direction, since the presidential election is long past and the demands of the war effort for national unity are fully recognized.

Regardless of the present willingness of the public to accept

<sup>31</sup> A.C.L.U. *Quarterly*, December 1939, p. 2, reporting the A.C.L.U.'s protest and the replies of Justice Department officials concerning the reported establishment by Sheriff Mangano of Brooklyn of a specially deputized civilian group to report on "subversive" activities and espionage. The Sheriff's claim that this group would be trained through "lectures by FBI men, fingerprint experts and members of the Army Intelligence Reserve," was sharply denied. Assistant Attorney General Rogge's reply was sweeping: ". . . this Department will not lend its authority or coöperation to the activities of such groups." Secretary of War Woodring's reply merely contained a firm enunciation of peacetime policy, without any indication of possible alteration in an "emergency": "It has always been the policy of the War Department not to engage in espionage activities in time of peace." Mr. Hoover's reply was extremely limited; he merely stated that his Bureau "has not extended and does not intend to extend any training or instruction to the group in question." This reticence is understandable on the part of Mr. Hoover, in view of the close relations that his Bureau has established with local law-enforcement officers, especially through the National Police Academy, to be discussed later. Any more sweeping enunciation of policy (such as Mr. Rogge's) might tend to weaken the close tie-up of the FBI with local law-enforcement agencies.

<sup>32</sup> See the *Report of Group 4 of the Federal-State Conference*: "3. In the matter of state and Federal coöperation in national defense, it is believed that existing state agencies are sufficient to extend appropriate state coöperation, and it is, therefore, recommended that existing law-enforcement agencies be utilized."

such centralization, however, the fact remains that it was to a large measure achieved by the Federal-State Conference in the fields both of policy and of administration, as will shortly be seen. The recommendations of the Conference were not, it is true, legally binding on the participants. Yet agreement on the part of important and powerful government officials to support a specifically enunciated list of centralizing policies and measures can in the long run produce centralization almost as effective as any imposed centralization, and it is to be noted that the recommendations of the Conference were unanimously approved by the participants.<sup>33</sup>

Insofar as the civil government alone is concerned, then, the agreement to support the recommendations of the Conference represents a great step in the direction of centralization.

#### *The Plan of Centralized Federal Control Set Up by the Federal-State Conference*

It has been shown above how the Conference itself represented the first step in the achievement of centralized Federal control: the mere calling together of state and local groups and their talking over of the law-enforcement problems of national defense, under the aegis of the Department of Justice, represents the establishment of a closer relationship and understanding. The formulating of a list of recommendations and the voluntary adherence of state groups to these recommendations represents a large measure of policy centralization.

But this policy centralization would have lost meaning had it turned out to be only a good-willed expression of local, state, and Federal opinion and aims. The establishment of a continuing Joint Conference Committee kept the Conference from falling into this dilemma.<sup>34</sup> This continuing Committee gave meaning and permanency to the policy centralization which the Conference represented. The Committee was charged with:

- "(a) furthering the recommendations of the Conference
- (b) advising in relation to research to be carried on

<sup>33</sup> Undated Department of Justice *Press Release*, "Specific Recommendations," probably issued about August 8, 1940.

<sup>34</sup> The Joint Conference Committee which had sponsored the holding of the Conference was set up, in accordance with Recommendation 26, as a permanent body consisting of 8 members, 2 from each of the four state-group sponsors (see p. 110 *supra*), acting "with the coöperation of the Department of Justice and such other governmental organizations as the Committee might desire. . . ."

- (c) recommending further legislation or administrative procedure suggested by such research
- (d) taking up with the Commission on Uniform Laws or such other group as the Committee might deem advisable the drafting of appropriate laws
- (e) aiding in the solution of any intergovernmental law-enforcement problems which may arise hereafter in the national defense field, and
- (f) advising in connection with the problem of public education respecting national defense, and conferring thereon with representatives of the American Newspaper Publishers Association, sectional newspaper associations, news-reel producers, and other helpful agencies."<sup>35</sup>

It became, in effect, a pressure group striving for the carrying out of the Conference-enunciated recommendations, through publicity and the persuasion of state and Federal legislatures. Because of the close relations of this Committee with the Department of Justice and various defense agencies,<sup>36</sup> it is to be expected—and has in fact been the case—that its point of view and its actions will reflect largely the desires of the Administration. This is especially to be noted in connection with the Committee's future activities in accordance with section (e) of the listing above. The lasting importance of this Joint Conference Committee cannot be overemphasized; in its hands will lie to a large extent the success of the Administration's plan of centralization.

<sup>35</sup> Department of Justice *Press Release*, "Specific Recommendations," *op. cit.*

<sup>36</sup> The Joint Conference Committee has its permanent headquarters in Washington, D. C. It has collaborated extensively with the National Defense Advisory Commission's Division on State and Local Cooperation and through it with the War Department's Civil Protection branch and the Commission on Uniform Laws, especially in relation to the drafting of a model Home Guard bill. The State Guard Act which finally resulted from this effort has been passed in many states (despite 3 vetoes—all before the beginning of the present war). The October 21, 1940 amendment to the 1916 National Defense Act (H.R. 10495) opened the way for such State Guards, but made their existence and equipment dependent on the approval of the Secretary of War, thereby giving the Federal government a measure of direct control which is obscured by the state's ostensible responsibility for the policies of the State Guard.

Additional action taken concerned: rejection of model state acts to regulate subversive groups or depelize private guards to protect industrial defense property; support of a Federal firearms registration bill and an amendment to the Federal Sabotage Act; and the preparation of model state legislation on sabotage prevention, control of explosives, and the protection of interstate public properties. See F. Biddle, "Civil Rights in Time of Stress," an address before the National Conference of Social Work, June 2, 1941.

Finally, the following out of the recommendations of the Conference must necessarily, by the nature of these recommendations, result in more centralization of administration. It is true that the emphasis of the Conference was frequently placed on the division of state and Federal powers, and much was made of the reaching of a basic agreement as to the respective fields of operation of the state and Federal governments. But this agreement in itself is a clarification of the picture which had not previously existed.

Furthermore, the undertaking by the states of parallel actions and the enactment by the states of parallel or uniform legislation is an influence tending toward an agreed support of a central policy. By "parallel actions" I refer to the recommendations concerning appointment of state defense councils,<sup>37</sup> surveys of national-defense resources and their protection,<sup>38</sup> publicity and counter-propaganda,<sup>39</sup> the control of education,<sup>40</sup> and assistance in facilitating Federal alien registration.<sup>41</sup>

The parallel legislation envisaged is extremely important, because in almost every case it relates directly to civil liberties. The Administration can exert decisive influence in connection with the content of this legislation, since the Joint Conference Committee is making wide use of Federal agencies for assistance in the drafting of the proposed uniform laws. In this matter the role played by the Commission on Uniform Laws, the technical experts of the Justice Department, and the legal counsel of various Defense Commissions is of special significance.<sup>42</sup>

<sup>37</sup> See Recommendation 1, Department of Justice *Press Release*, "Specific Recommendations," *op. cit.* Most states have already established such councils.

<sup>38</sup> See Recommendations 6, 7, 9, 10, 11. *Ibid.* The Report of Section 1 of the Conference urged "strict administrative supervision" of "special police deputized by the state or local authority" to deal with the protection of private property (p. 4). The Attorney General of West Virginia has already drafted a bill for licensing firearms in order to provide state control over special deputies.

<sup>39</sup> Recommendations 14, 15. *Ibid.*

<sup>40</sup> Recommendation 16. *Ibid.*

<sup>41</sup> Recommendation 17. *Ibid.*

<sup>42</sup> A United Press dispatch of November 14, 1940, indicates the effectiveness of this centralization and the continuing importance of the Joint Conference Committee. As the result of a series of explosions, accidents, and fires during the previous week which had caused an estimated \$1,000,000 damage and caused 14 deaths, the need was felt in Washington for action calculated to allay the nationwide alarm which appeared when sabotage was hinted (the FBI later reported that no sabotage was involved). Hence, the Joint Conference Committee announced that it was beginning the "drafting of model anti-sabotage and anti-espionage legislation today for presentation to 43 State legislatures which convene within a few months." *Boston Daily Globe*, Nov. 15, 1940. That this report was

However, in dealing specifically with this state legislation as it relates to "civil defense" (and this vague term, now of key importance, involves most of the clearest problems of civil-liberties control, whether protection, maintenance, curtailment, or denial) the Conference reports show a marked reticence. Recommendation 12 urges that:

"States should review their statutes in the field of civil defense in order to determine the adequacy of their laws relating to:

- (a) sabotage
- (b) criminal conspiracy
- (c) control of explosives
- (d) control of firearms
- (e) registration of members of foreign political organizations such as bunds
- (f) deputizing of special guards
- (g) protection of civil rights"

The more extensive Report of Section 2 of the Conference shows an equal caution in dealing specifically with the topic of civil liberties:

"9. It is recognized that the protection of civil liberties and the prevention of mob violence is primarily the responsibility of state and local governments."

The discussions carried on by the members of Section 2 are reported<sup>43</sup> to have revealed a decided disinclination on the part of Federal officials to talk about civil liberties in specific terms. The army and navy representatives "stayed away from talk about civil liberties" and concentrated their efforts on discussing plant protection and coördination of law-enforcement agencies. They were supported in this attitude by the FBI representatives. The other representatives from the Department of Justice were less reluctant to engage in a specific dis-

definitely calculated for its reassurance value is indicated when one realizes that the drafting of this legislation had actually been carried on early in October. Further, the carefully timed release of this information represents a move by the Joint Conference Committee to meet a situation not seen in August as immediately pressing, for Recommendation 13 of the Conference Report states that "State legislation making espionage and sedition offenses against the state is not necessary at this time, but when enacted, statutes should harmonize with existing federal legislation."

<sup>43</sup> In conversations with officials of the Division of State and Local Coöperation of the NDAC.

cussion of civil-liberties problems, but they too finally decided to avoid the enunciation of a clear policy and took the position that this problem should be left to state and local authorities.

The refusal to face a discussion of the problems of civil liberties in specific terms does not by any means indicate a failure on the part of the conference to consider these problems. It merely shows that the conference felt that direct treatment was impossible, largely because it would be impolitic and potentially a producer of sharp opposition. In addition, it shows that the conference was directing its attention primarily toward the control of *acts* deemed injurious to the nation.

Hence, while the conference gave out the sentiments quoted above as official policy in connection with civil liberties, it went ahead by indirection to deal with these very problems.<sup>44</sup> Recommendation 12, therefore, expressive of a policy of leaving civil-liberties problems to states, becomes fairly meaningless in the face of the centralization which, as has already been shown, was set up. It becomes even more meaningless when the role of the FBI and the recommendations for Federal legislation are considered.

One of the keynotes of the Justice Department's policy ever since the Presidential Order of September 6, 1939, has been insistence on the preëminence of the FBI investigation of the matters with which the Department is concerned.<sup>45</sup> The Federal-State Conference accepted this policy without question and even extended it somewhat in an effort to make the FBI the clearinghouse for all information concerning law-enforcement problems in connection with national defense.<sup>46</sup> Information on all cases involving national-defense law enforcement was to be submitted to the FBI, in secrecy and "without sifting," so that the FBI might "promptly determine which matters should be handled by the Federal and state or local

<sup>44</sup> Of the subheadings in Recommendation 12, policy in connection with (a) sabotage and (b) criminal conspiracy is directly involved in Recommendations 2-11 (inclusive) and 20; (b) control of explosives and (d) control of firearms is treated in Recommendation 21; (e) registration of members of foreign political organizations is dealt with in Recommendations 17, 19, and 23; (f) deputizing of special guards is involved in Recommendations 10 and 11; and (g) protection of civil rights is involved in virtually all the Recommendations.

<sup>45</sup> Examples are too numerous to list. Virtually every address by officials of the Department of Justice stresses this point.

<sup>46</sup> See especially Recommendation 2, and also Recommendations 3, 4, and 5. This policy was strongly advocated and frequently emphasized in all the Section Reports.

authorities respectively"<sup>47</sup> and definitely allocate the responsibility for such matters. This was in accord with the desires of J. Edgar Hoover<sup>48</sup> and the President.

This policy of the Conference, even considered superficially, increases enormously the importance of the FBI as a factor tending to the centralization of control of the civil-liberties problem. In addition, the choice which the FBI can exercise as to which cases to investigate further makes the nature of its policy in relation to civil liberties of critical significance.

But when the full ramifications of the FBI's relations with other governmental agencies, local, state, and Federal, are considered, the FBI is revealed as having a determinant power far greater than appears on the face of things.

Within the Federal government, the FBI has important and intimate tie-ups with the army and the navy.<sup>49</sup> These are not formal, explicitly worked out relations in many cases. They do not involve outright legal, organizational coördination. They are in the nature of a "close functional understanding." Further, the relations of the FBI and state and local law-enforcement agencies are also quite close. This has come about partly through the influence of the FBI National Police Academy,<sup>50</sup> partly through the FBI Regional Conferences,<sup>51</sup> partly through FBI coöperation in the inauguration and organization

<sup>47</sup> Report of Section 1 of the Conference, p. 4. The clash of the Attorney General with the Dies Committee over the overlapping and premature revealing of investigative activities is, among other considerations, an indication of the effort being made to centralize all investigation in the hands of the FBI. Department of Justice, *Press Releases*, Nov. 24, 1940, and Dec. 10, 1940.

<sup>48</sup> J. E. Hoover, "Protect America," *supra*. Representatives from the FBI were numerous and very influential at the Conference.

<sup>49</sup> For example, see p. 9 of Attorney General Jackson's address cited in footnote 12 of this paper. As an instance of the working agreement between the FBI and the army and navy, it was at the latters' request, in September 1939, that the FBI carried on an extensive secret survey of protective facilities of 1700 manufacturing plants engaged in the production of defense materials. Hoover, "Protect America," *supra*. Department of Justice *Press Release*, "Accomplishments of the Federal Bureau of Investigation . . . During the Fiscal Year Ending June 30, 1940."

<sup>50</sup> The FBI National Police Academy is a training school, in police policy as well as technique, for law-enforcement officers, held periodically in Washington, D. C. Eighteen sessions have been held since 1935, involving a total of more than 600 police officers representing about 90,000 law-enforcement officers, who have been enabled to return to their home police forces or to inaugurate police training schools.

<sup>51</sup> Department of Justice *Press Release*, "Accomplishments of the Federal Bureau of Investigation," *op. cit.*, p. 4. Held "in the various FBI Field Divisions with ranking law-enforcement officials to fully advise them as to the procedure to take in connection with the emergency matters which are arising from time to time and in order to enlist their coöperation in this work."

of police training schools,<sup>52</sup> and partly as a result of the unusually influential position afforded the FBI by the support and approval of public opinion over the whole country. In addition, the FBI can boast of similar tie-ups with such powerful groups as Army Corps Area Commanders, the International Association of Police Chiefs, the American Legion, and many others.

All these close relations go to enhance what might loosely be called the "autonomous" power of the FBI; *i.e.*, its power to act on its own initiative and at possible variance with the policies of other government officials. These tie-ups emphasize the importance of the FBI as a centralizing agency.

The immediate problem, therefore, is twofold: (1) how effective are the controls which the higher officials of the Department of Justice and the President can exercise over the actions and policies of the FBI, and (2) to what extent does the FBI have policies at variance with the policies supported by these superior officials?

These questions cannot be given a definite answer. Clearly, as a technical matter the control of the President and the Attorney General over the FBI is complete.<sup>53</sup> As a matter of practice, there is much evidence that even the President might not, without risk of serious and strong opposition both governmental and public, be able markedly to curb the FBI. To my mind the answer lies between these extremes. It is to some extent conditioned by the answer to the second question: so long as there is no clear-cut opposition in policy between the FBI and the other Administration officials the control which the latter may exercise is probably fairly complete. If, however, such clear-cut difference of policy should appear (though the possibility of its appearance is, of course, greatly lessened in wartime, yet it remains of some importance, especially in rela-

<sup>52</sup> During the fiscal year ending June 30, 1940, 418 such schools were opened. Department of Justice *Press Release*, "Accomplishments of the Federal Bureau of Investigation," *op. cit.*, p. 8. These activities have all been coördinated in a general "FBI Law Enforcement Officers Mobilization Plan for National Defense." FBI document for official use only, May 9, 1941. In addition, the inauguration of "FBI Civilian Defense Courses for Police" in 55 cities, in coöperation with the Office of Civilian Defense and with the approval of Mayor LaGuardia, promises to extend the influence of the FBI even more widely. Department of Justice, *Press Releases*, September 28 and October 20, 1941.

<sup>53</sup> ". . . every activity of the FBI is scrutinized at periodic intervals by the Attorney General, the Bureau of the Budget, the Appropriations Committee of the House of Representatives and the Senate, and later by the Congress of the United States." J. Edgar Hoover, letter to George Seldes, August 27, 1941.

tion to the postwar situation), the effectiveness of control over the FBI might be gravely challenged. This dynamic question, therefore, must be kept in mind in making any estimates of the nature of the Administration's centralization plan.<sup>54</sup>

An additional move in the direction of centralization appears in connection with Recommendations 19 through 25 of the Federal-State Conference. These urge either the supremacy of existing, or the desirability of new, Federal legislation in relation to aliens, sabotage of war matériel, firearms control, and the registration of foreign agents.<sup>55</sup> They also urge that the Federal government carry on propaganda investigation and national-defense publicity. Many of these recommendations have already been followed out to a large degree.

#### *Importance of the Federal-State Conference*

The Federal-State Conference is the major enunciation of Administration policy relating to the control of law-enforcement problems. It has had, throughout, the approval and support of the President. It marks clearly the setting up of Federal machinery, some revealed, much still obscured, to unify the treatment of these problems. Some of this machinery has been formalized, as in the case of the Joint Conference Committee; much of it still remains on the plane of "close understanding" and "coöperation." But it is clear that centralization of policy and administration is here being effected to cope with the law-enforcement problems that exist in time of emergency.

As has been pointed out above, all of these law-enforcement problems impinge on civil liberties. Will the constitutional right to bear arms be respected? Clearly in wartime some limitation and regulation of this right is necessary. The Conference policy calls for an increase in restrictions on this right through the passage of a Federal firearms-control statute. Will un-

<sup>54</sup> There is much more which might be said here as to the potential and existing internal conflicts in the Federal government, between, for instance, the FBI and the Treasury Department Secret Service, the FBI and the Attorney General, the FBI and the various other units of the Justice Department, the FBI and the Congressional Investigating Committees, etc., but as it is only hoped here to indicate the existence or the potentiality of these conflicts and to suggest their impact on the centralization of civil-liberties control, this must suffice.

<sup>55</sup> J. E. Hoover, "The Present Task of Law Enforcement," an address before the Forty-seventh Annual Convention, International Association of Chiefs of Police, Milwaukee, September 9, 1940, p. 5.

limited freedom of speech be maintained? The Conference policy calls for a careful, continuing study by the Federal government of "propaganda." The full answer here has not yet been crystallized. The policy of surveillance and the use of counterpropaganda has been supplemented by the establishment of the Office of Censorship under Mr. Byron Price.<sup>56</sup> Greater restriction may come later. If it does come, the machinery is ready for the application of restrictions on a national scale, in a uniform way. Will vigilanism and mob action be restrained? The Conference policy calls for the channelization of all counterespionage and investigation in the hands of the FBI, the carrying out of all civil-defense activities by duly constituted authorities, not volunteer groups, and the strict enforcement of existing laws and such new, uniform laws as may be enacted.

This specific enumeration could be carried farther, but need not be, for it should be abundantly clear at this point that the major items of Administration policy have been firmly established by the Federal-State Conference. The Administration is now equipped to deal with civil-liberties problems on a broader and more effective level than before. Certain specific restrictions on civil liberty are now being urged and put through in the form of new legislation. Additional restrictions can now be more readily set up and enforced at the will of the Administration. And much of the responsibility for the maintenance and protection of civil liberties has been drawn away from the states, with their consent and coöperation, into the hands of the Federal government. A major change in group relationships has taken place and is continuing.

This discussion has not been designed primarily to show that the Administration is for or against the protection of civil liberties, or that it is for or against the protection of any specific civil liberty. Though this may frequently be implicit in many of these comments, nevertheless, that is incidental. The prime objective has been to show how the Administration plans to deal with civil-liberties problems, what its policies are in meeting an emergency situation, what changes in governmental organization or governmental group relationships have been

<sup>56</sup> This seems to be a further working out of the centralization policy. See: Office of Government Reports, *This Week in Defense*, December 19, 1941, Washington, D. C.

brought about under the impact of crisis, how these changes have been brought about, and what the outlook along these lines is for the future.

Much of this has already been indicated, whether specifically or by implication. One further point remains to be mentioned in order to bring this study full circle.

The Federal-State Conference and the plan of centralization which it represents is the Administration's attempt to solve the abuses of law enforcement and civil-liberties control evident in the experience of the first World War. It is also the Administration's attempt to meet the new problems presented by the present world crisis. With warfare on a far more totalitarian basis than in 1914, and with a clear and present totalitarian threat to the United States, a far greater need for national unity is evident. But in order that this national unity may be achieved without disrupting American social and political existence, the Administration has realized that it must be achieved within the existing social and political framework. This is a framework that stresses diversity. The only possible basis for the unity which the Administration and the nation desire is therefore a unity created by the voluntary agreement of the diverse elements. This the Federal-State Conference has been designed to achieve. The unity of control set up by the Conference and by the emphasis on the FBI as a central agency of law enforcement is not, to my mind, an imposed unity. It has been achieved primarily through the initiative and leadership of the Federal government, it is true, but the support for this unity has come voluntarily from the diverse elements that have been drawn together.

The success of the Administration's attempt to meet the new problem of the hysteria caused by the fall of France and inherent in subsequent world-shaking events cannot be readily judged. Hysteria is difficult to measure. But the fact that the state governments have been content, since the Federal-State Conference, to leave, for instance, alien registration wholly to the Federal government is even more indicative of a measure of success. Repetitions of the Governor Rivers incident seem to have been forestalled. The willingness of the states to adopt the uniform legislation proposed by the Conference will be a measure of success, not only of the checking of hysteria, but also of the checking of the overzealousness of the state governments evident in the last war.

The picture at this moment is a peculiarly dynamic one. The Administration has made an energetic attempt to solve the problems that confronted it. If this is successful, the policy of the Federal-State Conference will probably continue during the war as the basic Administration policy. If it fails, if it is insufficient, if new problems arise, the Administration, now better equipped, will undoubtedly move by altering or amending or expanding this policy to cope with the new situation. The testing of the Administration's policy will come every day. So far it has not been altered in its major aspects. At this point it appears to be in the main a democratic answer to a totalitarian problem.

#### CRITIQUE

There are, finally, certain considerations that should be treated critically in order to bring out the shortcomings and the advantages of the policy of the Administration as expressed in the Federal-State Conference.

Insofar as the conference represents the high-water mark of a process of voluntary centralization of control of civil-liberties policy in the hands of the Federal government, it seems of decided value. Clearly such centralization should help to avoid the confusion of the last war. It should, in addition, promote the maintenance of civilian morale in this war for a free world. The agreed uniformity of treatment which this centralization policy is striving to achieve seems both wise and necessary.

But there are marked dangers which must be pointed out. This program will serve better to protect our traditional civil liberties and to ensure the enjoyment of those liberties only so long as Federal officials have a staunch determination to use this centralization for protection. If this determination wavers and Federal officials decide to use the system of centralized control solely for restrictive, repressive purposes, our civil liberties will vanish in double-quick time. If, for instance, any single official is permitted to become the sole judge of which varieties of free speech are conducive to the "softening of public morale," and therefore criminal, the distinction between subversive acts and "subversive" views may be blurred and all views which are not "friendly to the government, friendly to the war, and friendly to the policies of the government," as interpreted by that official, may well become subversive. If

the FBI should decide to investigate, for instance, only strikers and not profiteers, or only foreign fascists and not home-grown fascists, our civil liberties would stand in danger of destruction. Civil liberties, then, depend for their existence on the willingness and determination of government officials, and now, more than before, on the willingness of Federal officials, to uphold them.

The final sanction lies here, as always in a democratic country, with public opinion. If public opinion is little concerned with civil liberties and no effort is made to insist on their protection, the government officials, unguided, will be free to destroy or preserve civil liberties as they alone see fit. If the public, on the other hand, continually and vigorously insists on the protection of civil liberties, the potential destroyers of these liberties will have to tread lightly lest they be revealed and repudiated.

But the question then comes to mind, how can the pressure of public opinion be exerted? Where can the lever be applied to pry loose those who would curtail or destroy our civil liberties? Much of the centralization described in this paper is *sub rosa*, hidden, obscure. This may well have been a situation forced by the political and psychological exigencies of the preëlection and prewar period during which the Federal-State Conference was held; but should such a structure of covert centralization now and in the future remain covert? This would seem to increase the potentiality of danger to our civil liberties.

One major fault of the Administration's plan of centralization is that, to a large extent, it leaves ostensible responsibility to state and local groups while covertly concentrating actual responsibility in the hands of Federal groups. This is an excellent defense mechanism to circumvent possible popular opposition to the Administration's policy. But it may also become a pernicious method of avoiding effective popular opposition to a repressive Federal policy.

There are two ways of meeting this difficulty. One is to leave the picture as it is and attack the ostensibly responsible state or local group for any undesirable policy. This would, if enough pressure should be applied to the group, be highly destructive, for it would promote the withdrawal of the state or local group's voluntary support of the centralization plan. And that in turn would merely recreate the entire disunited

system of the first World War, or it would invite the Federal government to attempt to impose its will on the state or local group—or on the protesting public. This is precisely what must be avoided.

It can be avoided by making use of the second method of meeting the difficulty; that is, by placing ostensible responsibility for the protection of civil liberties during the emergency squarely on the shoulders of those actually responsible: the officials of the Federal government. This might be done within the existing structure of the Federal government, possibly by extending the power of the Civil Rights Section of the Department of Justice or of the Office of Censorship,<sup>57</sup> making in effect an Office of Civil Rights, concerned not only with restrictive functions, such as censorship, but also with the duty of protecting civil rights against unnecessary invasion. This would be of great value, but in itself would not be enough so long as the actual responsibility is still scattered about in the Federal government from the White House to the Justice Building. Such a commission should be an official and permanent body definitely charged with authority in all matters relating to civil rights, having in it representatives of all the groups concerned, including civilian groups interested in the protection of civil liberties. Its activities should be wholly public and subject to frequent scrutiny. At all costs, and most importantly, it should strive to retain as much as possible of the voluntary nature of this centralization, trying to secure the willing agreement of state and local groups to its plans and policies.

In this way it might be possible to overcome the shortcomings of the present structure and keep the advantages which it

<sup>57</sup> The establishment of the Office of Censorship, under Mr. Price, is in itself an encouraging indication of a recognition on the part of the Administration of the necessity for an openly responsible central Federal agency to deal with these matters. The President's emphasis on "a partly voluntary, partly compulsory censorship over information which might be helpful to the enemy" and his careful limitation in subsequent addresses of the field of censorship involved, indicates a continuing adherence to the valuable approach to civil-liberties problems already undertaken. Office of Government Reports, *This Week in Defense*, December 19, 1941, Washington, D. C.

An expression of dissatisfaction with the present censorship setup in *Time* magazine, January 5, 1942, p. 31, seems to be based largely on the failure to co-ordinate the activities of the Office of Censorship and the army and navy, and the overzealousness of some army and navy censors. This merely emphasizes the need for a Federal agency with over-all control of the censorship problem in all its aspects.

manifestly offers. The creation of such a responsible, public coöordinating commission charged with all questions of civil rights would ensure the ability of the present Administration to deal justly and effectively with this vital problem of a dynamic democratic society.

Broadly speaking, there may be discerned two alternative views as to the proper method of dealing with the problem of civil liberties. In the hope that certain dissentient and oppositionary elements of the population can be made ineffective and be prevented from acting as a disunifying force, the civil rights which now protect these elements from suppression can be "temporarily sacrificed" on the arbitrary dictates of high authority and without reference to public approval, with the hope and expectation that these civil rights will be reëstablished at the end of the war. This would be the suicide cure, the narrowing and rejection of democracy in order to protect democracy. It holds no guarantee of the return of freedom with the return of peace. It presents, on the contrary, the acute probability that the power group in control of the government would, with the passing of the war crisis, be desirous of perpetuating its control. And with the means of opposition "temporarily sacrificed," our society would be relentlessly propelled onto the roster of authoritarian regimes.

On the other hand, in an effort to avoid the impairment of civilian morale and the resulting disunity which would come with the suppression of opposition and attempts at the regimentation of opinion, all civil rights can be scrupulously upheld, and even extended, so as to serve as tangible evidence that no attempts will be made at tyrannical rule favoring certain limited interest groups. If the people can thus be assured that they will not be forced to kowtow without chance for objection to the acts and policies of an oppressive government, the chances for national unity will be vastly increased. The tendency toward an intensification of internal social cleavage, which contributed so disastrously to the fall of France, will be minimized and possibly reversed. The common purpose of the country will rest upon coöperation in meeting a common danger, not upon coercion.

If this open assumption of responsibility by the Federal government were accompanied by a firm rejection of the fallacious "imposed temporary sacrifice" theory and an ac-

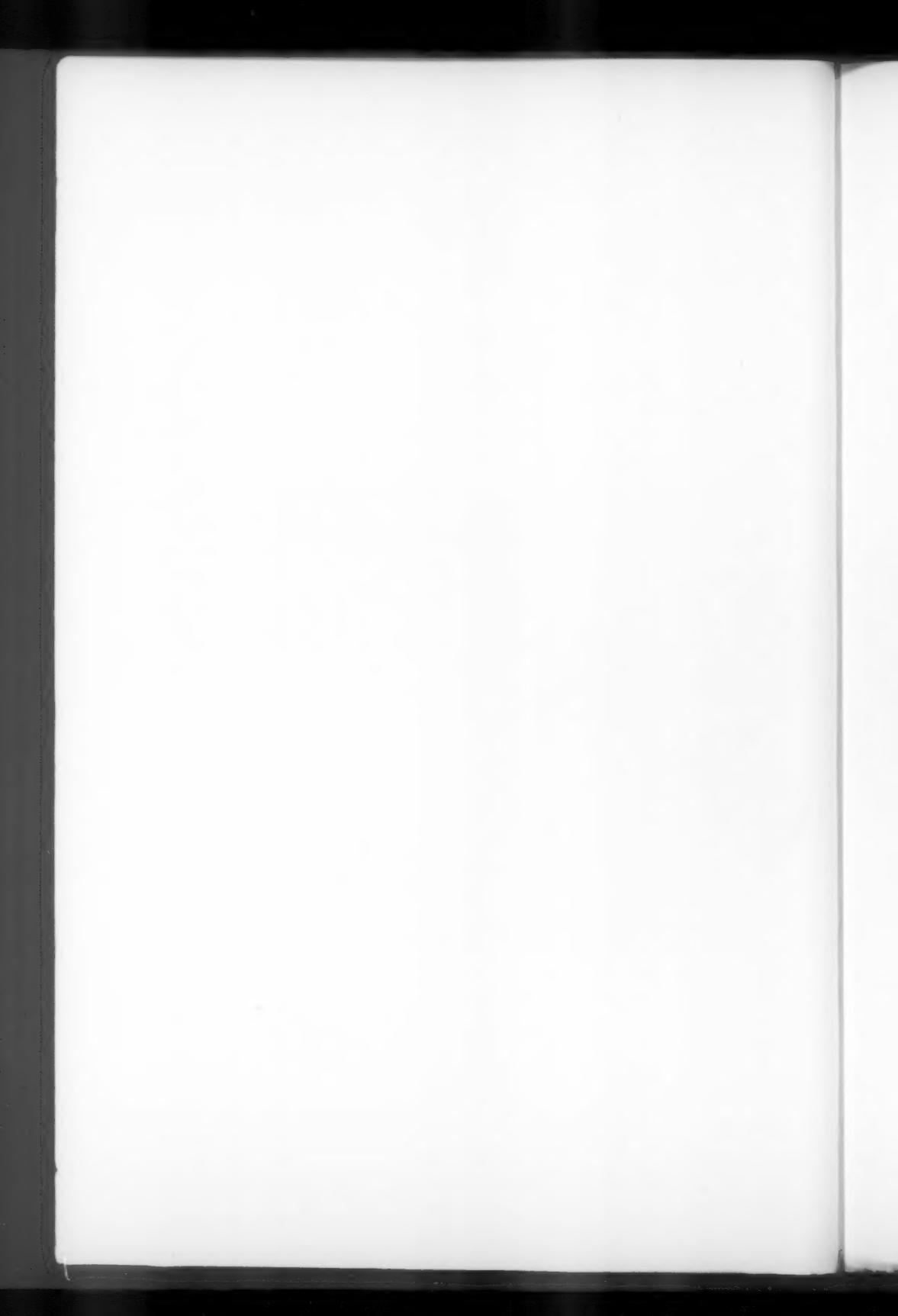
ception of the idea that national unity is advanced and not retarded by the full maintenance of civil liberties, it might be possible to preserve these rights unimpaired and even to extend their scope.

There seems to be good evidence that the way in which a crisis is faced or a war fought determines to a large extent the nature of the government that will follow. If this be true, then a democratic technique of achieving national unity through the full maintenance of our civil liberties should go far to ensure the continuation of democratic government with the return of peace.



**PART II**

**LABOR AND THE WAR**



## MOBILIZATION OF LABOR RESOURCES FOR THE DEFENSE EFFORT

*D. H. Davenport*

ONE of the major tasks facing the United States government in the defense effort has been to provide an adequate supply of trained man power for the production of war materials. In this task the government has sought the coöperation of management and labor, with a view to the formulation of policies that would make the production methods of democracy more effective and more powerful than those of any compulsory system.

Administrative direction of the movement and training of workers to meet the specific needs of defense production is required for the most efficient use of the nation's labor supply and its vocational training facilities. Various government agencies were assigned parts of this task at the outset of the defense program. As the requirements of the program expanded, with increasing appropriations for defense production, new approaches to the problem of mobilizing the labor resources of the nation were developed, and special agencies were established to carry out those policies. To coördinate these functions and activities a National Labor Supply Committee was established in the early summer of 1941 in the Labor Division of the Office of Production Management, now the War Production Board. The Labor Supply Committee is composed of the representatives of the several government agencies which are concerned with recruiting, training, and labor-market analysis. The Labor Supply Branch, functioning through twelve Regional Labor Supply Committees, translates into action the program and policies developed by the National Labor Supply Committee.

The task of mobilizing the nation's man power for defense production has four major aspects: (1) determination of future labor requirements; (2) provision of efficient machinery for job placement; (3) fullest utilization of workers who already possess requisite skills; and (4) operation of a nationwide training program. These will be discussed in sequence, followed by a

summary of the principles, objectives, and present operative arrangements of the Labor Supply Branch and its constituent Regional Labor Supply Committees.

#### DETERMINATION OF LABOR REQUIREMENTS

Reliable estimates of the numbers of workers of specified skills who will be required in particular localities at various times are essential to assure a smooth flow of production as the defense program expands and accelerates. Comparison of the expected demand for labor with the available supply provides the basis for the planning of training programs, serves as a guide for the allocation of defense contracts and the selection of locations for new plant facilities in areas that have the required labor reserves, and, finally, serves as a guide to officials planning the construction of defense housing projects and the expansion of community services and public utilities.

The Bureau of Labor Statistics of the United States Department of Labor, which regularly reports the changes that are taking place in employment, was assigned the task of mapping labor requirements for defense production. Its employment record, maintained over many years through the coöperation of thousands of reporting employers, provides a perspective of defense demands on the labor market, both in over-all terms and in terms of particular segments of the economy.

Since the summer of 1940 the Bureau of Labor Statistics has been preparing estimates of the man-years of labor required to complete the defense program set up by Congressional appropriations, contract authorizations, and other allocations of funds. General estimates are built up from information on the share of the national income earmarked for defense and on statements of treasury disbursements. In addition, use is made of employment requirements determined from defense construction contracts, and from reports on the expected labor force indicated on the "certificates of necessity" for plant expansion and when loans are authorized by the War or Navy Departments and the Defense Plant Corporation.

Over-all estimates of the total number of wage earners that will be required to complete the defense program have extremely limited usefulness; however, they do provide a rough indication of the expected drain on the man power of the nation

and of the over-all need for training. As a basis for administrative decisions and actions, the estimates of defense labor requirements must be very specific.

The future labor requirements in specific occupational categories for selected defense industries, such as aircraft, shipbuilding, machine tools, ordnance, and building construction, are estimated by the Bureau on the basis of "labor patterns." By analysis of the pay rolls of government construction projects the Bureau developed, prior to the defense program, schedules that showed by occupation the labor time required to complete various types of vessels, buildings, roads, bridges, and other construction projects. With information on general specifications and the length of time allotted to build, say, a submarine, by means of the standard pattern for that type of vessel, the Bureau can estimate the monthly labor requirements by occupations. First, however, a check is made to see whether the pattern needs adjustment because of changes in design of the vessel or improvements in construction methods. Likewise, appropriate adjustments are made if the over-all time allowed to complete construction is different from that used in developing the standard pattern, or if the length of the prevailing work week has changed. In this way estimates can be provided of the number of men in each classification of skills and trades that should be working on each vessel at any given date in the future. A composite of the labor required on all the scheduled vessels provides the estimates of the monthly occupational labor requirements arising from the defense shipbuilding program.

A similar technique is followed in estimating the labor required to keep output in aircraft and other defense industries flowing on schedule. The problem is more complex than in the case of the relatively stable building and naval-construction industries, where techniques have not changed radically in recent years. Under the pressure of the defense program the aircraft industry is shifting from custom production to mass-production methods. New processes and new techniques are being introduced continuously. The field agents of the Bureau of Labor Statistics have gathered information directly from plant visits. In addition, the Bureau has been assisted by an employment reporting system instituted by the Army Air Corps. On the basis of this information, the labor patterns for

the various segments of the industry are checked frequently and revised as necessary. Thus the Bureau is able to estimate with reasonable accuracy the number of workers in each craft or trade that will be needed on the aircraft industry's pay rolls as a result of defense contracts extending many months into the future.

The labor requirements estimated by the Bureau of Labor Statistics are used by manufacturers, by the War Production Board, by the Defense Housing Coordinator, by the Selective Service System, and by the United States Office of Education.

Intimate knowledge of the local labor market, particularly as it is related to the demands of specific defense employers, is also of vital importance. The 1500 public employment offices scattered throughout the nation have been collecting such information for their respective areas since the beginning of the defense program. Estimates of labor needs in local defense industries for a six-month period ahead are prepared on the basis of data obtained through personal visits by representatives of local employment offices to employers in defense industries. Visits are made every other month and detailed information is obtained regarding the number and kind of hirings the firm would like to make over the next six-month period.

The employment offices compile information monthly on the number of registered workers who are skilled in a selected list of more than 600 occupations considered essential to defense industries. By relating the supply to the demand for workers possessing these skills, it is possible to determine those occupations in which shortages or stringencies are occurring. In addition, the employment offices prepare an annual inventory of registered job seekers which comprises the most comprehensive current information on the character of the unutilized labor supply available for the defense program. A detailed analysis is presented of the occupational, industrial, and personal characteristics of the persons registered. Information of this type, when compiled for the nation as a whole, is valuable for comparison with the estimates of labor requirements from the Bureau of Labor Statistics.

#### JOB PLACEMENT

The United States Employment Service has been designated the official defense employment agency of the War

Production Board. This Federal agency, through its 1500 local employment-service offices, provides facilities for the registration, classification, and placement of individuals available for employment. All workers applying for unemployment compensation are required to register in these offices. The services of the office are free and are available to all workers.

The Employment Service maintains a clearance system for supplementing local labor-recruiting activities so that workers may be directed to job opportunities outside the community. Clearance is one of the functions of this Service, which makes it a truly national service to expedite the defense program. When a local office is unable to supply a worker with a particular skill, it communicates with offices in adjoining areas to determine whether the desired worker is available there. If not, the order is forwarded to the state employment headquarters, which makes a canvass of all its employment offices. If no worker to meet the employer's specifications is found within the state, the order is transmitted to a regional clearance officer. If the regional search does not yield the needed worker, the order is forwarded to Washington for clearance with other regions. This clearance system facilitates an orderly shifting of labor and helps to prevent migration to areas where the labor supply is adequate. Care is taken, moreover, not to refer qualified workers from a community where they will be needed within a short time.

All workers who register at the employment offices are carefully interviewed to obtain information on occupational and industrial experience and personal characteristics. Trade-test questions have been developed in order that the interviewers may determine accurately the extent of training and experience of workers claiming skill in certain occupations. The offices are also prepared to test worker aptitudes and performance, and to provide guidance and counseling services for workers.

In order to assure the most adequate use of already employed workers through job analysis and upgrading, representatives of the local employment offices consult with employers concerning the recruitment of workers in occupations in which there are shortages. Defense firms needing technical service on training problems are advised of the availability of technical assistance to facilitate this work.

On the basis of orders from employers, registrations, and the

general labor-market information obtained in the manner described above, the local employment offices are in a position to determine the number of workers that need to be trained for various skills and trades, and to certify such persons from among their registrants.

In order that job requirements of defense plants may be met rapidly and in an orderly fashion, all employers are urged to recruit through the facilities of employment offices, and all workers unemployed and available for placement are urged to register. Local offices carry on continuous publicity programs to that end. Newspaper releases, radio talks, speeches, pamphlets, and posters are pointed up to attract workers to local offices and also to stimulate young or "rusty" workers to take advantage of training or refresher courses, provided gratis by the government.

The United States Civil Service Commission is responsible for the recruiting of civilian personnel for the government departments participating in the defense program, including the manufacturing arsenals and United States Navy Yards. The Civil Service Commission maintains a close relationship with the Employment Service in order to facilitate the location of available labor to meet the requirements of government establishments. The Commission calls the attention of the Federal agencies to the desirability of in-service training programs and apprentice training. Under the exigencies of the defense effort, the Civil Service Commission has substantially altered its age specifications for skilled occupations, in some cases advancing the upper age limit by many years, in order to help supply the need for skilled workers.

#### MEASURES TO SECURE FULLEST UTILIZATION OF TRAINED WORKERS

Scarcity of workers with particular skills can be met in the long run only by training, but there are a number of methods to secure the fullest utilization of workers who already possess those skills. Some that have been developed in the effort to mobilize the man-power resources of the nation are of permanent value. Others merely bridge the gap until sufficient training can be given.

The most obvious development of the latter type is the

resort to longer hours of work. Increasing overtime has been the practice in the machine-tool industry, in ordnance plants, and in many other defense industries, as evidenced by the monthly reports of the Bureau of Labor Statistics on hours of work per man per week.

#### *Selective Service Deferment*

One of the first steps taken to prevent depletion of the nation's skilled labor supply was the preparation by the Bureau of Labor Statistics of a list of selected occupations which were of peculiar significance in the national defense program. This list, which is revised as labor-market conditions change, establishes grades for each of some 760 occupations according to the length of the training period required and also according to the relative adequacy of the supply.

Although the local draft boards are autonomous and have final responsibility for classification of the men who are called, as a guide to their decisions they have had this list and also information supplied by the employment offices regarding the local labor markets. An educational campaign has been conducted to make clear to the members of the local boards that, for the success of the defense effort, trained workers are more effective in productive work than in direct military service and that any decrease in the supply of skilled workers will slow down production of essential war materials.

#### *Reduction of Labor Turnover*

Rapid labor turnover, which is characteristic of periods of expanding production and employment, has been particularly marked during the defense program. While layoffs and discharges declined as compared with predefense days, voluntary quits increased substantially, as shown by the monthly reports of the Bureau of Labor Statistics on turnover in manufacturing industries. Workers have been attracted by higher wages and also by the overtime work that many defense plants offer. Competitive bidding by employers became common. Some holders of defense contracts advertised widely and sent out labor scouts to raid the skilled labor supply elsewhere. Not only do these practices result in chaotic labor-market conditions with much unwarranted migration of workers, but they

mean a serious loss in man-hours of work. Two measures have been undertaken to overcome this situation.

Since the formation of Regional Labor Supply Committees, there has been a particularly vigorous educational campaign, to persuade employers to recruit through the employment offices, to use all the reserves of local labor before soliciting labor from outside the area, and to refrain from advertising for labor, locally or otherwise, without first consulting the employment offices concerning the necessity for such action. Employers are expected to coöperate increasingly as the employment offices prove their ability to supply the employers' needs from local labor or through clearance. The employment offices, on their part, will in most cases refuse to place workers already employed in defense plants unless their skills are not being utilized to the fullest extent.

The second measure designed to reduce labor turnover is the development of stabilization agreements which provide for uniform working conditions throughout a region. For example, nationwide stabilization of the shipbuilding industry for the duration of the emergency was attempted during the summer of 1941, following ratification by the unions concerned of four zone standard agreements approved by the Office of Production Management, the Navy, and the Maritime Commission. Similar agreements were effected in the Pacific, Atlantic, Gulf Coast, and Great Lakes districts. They cover wages, determined on the basis of studies by the Bureau of Labor Statistics, hours, overtime rates, and provision for training. They guarantee against curtailment of production, establish grievance machinery for union members, and provide a ban on strikes and lock-outs. In some of the agreements, provision is made for the automatic adjustment of wages on the basis of changes in the cost of living as reflected in indexes of living costs compiled by the Bureau of Labor Statistics. A Shipbuilding Stabilization Committee operates under the War Production Board.

A Building Trade Stabilization Board of Review has been established by agreement between the Government and the AFL building and construction trades engaged in defense work. This agreement likewise provides for the stabilization of working conditions and pledges against work stoppages "on account of jurisdictional disputes or for any other cause." The Board's function is to adjust disputes arising under the agreement.

Efforts to establish zone agreements in the aircraft industry, similar to those worked out for shipbuilding, are in progress. By the establishment of uniform wage rates by occupations within broad areas, such agreements should prove a useful instrument for reduction in labor turnover.

#### *Reduction in Loss of Time Through Strikes*

The most important measure for reducing loss of time through strikes was the establishment of the National Defense Mediation Board by executive order of March 19, 1941. This board, placed in the Office of Emergency Management, was composed of eleven members, four each representing employers and employees, and three disinterested persons, each having an alternate. Whenever an industrial dispute obstructed or was likely to hinder or obstruct national defense and could not be adjusted by the Commissioners of Conciliation of the Department of Labor, the Secretary of Labor certified that dispute to the Board. The Mediation Board was authorized to make every effort to settle the controversy by assisting the parties to negotiate agreements to that end, by affording means for voluntary arbitration, by investigating the issues, conducting hearings, making findings of fact, and formulating recommendations for settlement.

When a dispute was referred to the Board, the Chairman designated certain members as a division of the Board to act on the case. Such a division had at least three members, and each of the three groups comprising the Board was represented.

With a view to settling disputes without interruption to continuous defense production, the executive order also declared it the duty of employers and employees to give to the Conciliation Service of the Department of Labor and to the Office of Production Management written notice of desired changes in existing agreements, wages, or working conditions, information as to all developments in labor disputes, and notice of threatened strikes or lockouts sufficiently in advance to permit exploration of all avenues of possible settlement.

In many instances strikes or lockouts were avoided. In other cases, workers already involved in strikes agreed to return to work pending study of the issues and formulation of recommendations by the Board. The saving in labor time was sig-

nificant, as may be seen from the fact that during its period of existence, from March 19, 1941, to January 12, 1942, the Board settled 90 of the 114 cases certified to it.

On January 12, 1942, the Defense Mediation Board was transformed into the War Labor Board. Like its predecessor, the new War Labor Board is in the Office of Emergency Management. It is composed of twelve members, four each representing the public, the employees, and the employers. Whenever an industrial dispute is likely to hinder or obstruct the effective prosecution of the war and cannot be adjusted by direct negotiation or by the Commissioners of Conciliation of the Department of Labor, the Secretary of Labor certifies that dispute to the Board, or the Board may take jurisdiction of the dispute on its own motion. The Board may settle the controversy by the use of mediation, voluntary arbitration, or arbitration under rules established by the Board.

During the first month of its existence the Board received a total of 65 labor disputes affecting national defense and involving 779,530 men, as against 15 cases involving 37,254 men certified to the National Defense Mediation Board during a comparable period of time. Of these 65 cases, the Board took jurisdiction of one on its own motion, 42 cases were certified to the Board, and 22 were unfinished Mediation Board cases. Up to February 12, 6 of these cases had been closed by mediation and one by Board decision.

The Labor Relations Branch of the Labor Division of the War Production Board sometimes aids in the settlement of controversies at an early stage. It acts to avoid work stoppages, also, by active efforts to make clear to union officials and members the requirements of the defense program and the philosophy and objectives of the Labor Branch.

#### *Nondiscrimination in Employment*

One objective of the Labor Supply Branch is to ensure that discrimination because of sex, race, creed, color, or national origin shall not prevent the employment of qualified workers in defense industries. In view of the scarcity of workers with certain skills, every effort is made to see that all classes of workers who have the occupational qualifications are utilized to the maximum advantage.

In the spring of 1941 the President issued an executive order "reaffirming the policy of full participation in the defense program by all persons, regardless of race, creed, color, or national origin," directing that all federal departments and agencies concerned with vocational training programs for defense production should assure that such programs were administered without discrimination and that all defense contracts negotiated thereafter should include a provision obligating the contractor not to discriminate against any worker because of any of these factors. Moreover, under this order a Committee on Fair Employment Practice was established in the Office of Production Management to receive and investigate complaints of discrimination in violation of the order and to take appropriate steps to redress grievances found to be valid.

#### *War Disemployment*

As the exercise of priorities on raw materials and machinery becomes more stringent, the problem of war disemployment becomes increasingly serious. Workers are displaced because of production curtailment resulting from the operation of priorities, as in the case of aluminum, copper, and silk, and also by the temporary closing of plants preparing to retool for war production, as in the case of certain sections of the automobile and metals industries. Swift and effective action in such instances is essential in order both to maintain the morale of the displaced workers and to avoid wasteful immobilization of needed workers, many of whom are skilled in occupations urgently needed in defense industries.

To meet this situation, which has become serious, the Labor Supply Branch has developed procedures designed to assure full and continued utilization of workers and plant capacity. Cooperation of labor, management, and a large number of federal, state, and local agencies is essential.

In one of the first instances of disemployment resulting from retooling, a procedure was developed that has come to be known as the "Buffalo Plan," a technique for the training, retraining, and placement of unemployed workers. This plan was devised by the Labor Supply Branch of the Office of Production Management when it was brought to their attention that several thousand workers in an automobile plant in Buffalo were sud-

denly laid off while the factory was being reequipped to produce airplane engines for defense. The retooling job was to take six or eight months. A conference was called of union officials and representatives of the New York State Employment Service and the Buffalo Board of Education, and the possible extent of their coöperation was explored. Formal meetings were then held with the large defense-plant employers in the city. They offered full coöperation, and the following program was adopted and put into effect:

(1) Federal and state agencies were to be organized, with labor and employer coöperation, to get the displaced workers registered for unemployment compensation, which, it was agreed, would be paid during the period of training necessary for defense work; these agencies would register and classify men available for immediate employment, and would arrange for retraining the balance as quickly as possible. (2) Qualified workers of this group were to be given preference for defense jobs over applicants from outside the Buffalo area. (3) The labor-union representatives agreed to provide a master list of their membership in these plants, which was substantially the same as the list of displaced men. The union sent a letter to each of these, notifying him to register at the State Employment Service office for unemployment benefits and to be interviewed for assignment. A special card was attached, asking the worker to notify the Employment Service of any changes in employment status during or after his training period. (4) The State Employment Service arranged for its whole staff to be at its offices at night during an entire week to interview displaced workers. About 700 workers were asked by the union to report one night, a similar group the next, and so on, until all were interviewed. Vocational-school and union officials were present to aid in the interviews and in assignment to special classes. The four big defense plants in the city hired 900 of the displaced workers at once, and 400 others were absorbed in other plants in the area. Most of the others were lined up for training aimed directly at defense needs in the Buffalo area.

When the impact of the order "freezing" raw silk began to have an effect on the 175,000 workers in the silk-throwing and weaving industry, a similar conference was called in Philadelphia. Fifteen of the largest defense employers and the same number of labor-union leaders conferred with officials of the

Labor Supply Branch of the Office of Production Management and drafted a more general program along the same lines. Again it was agreed to give preference in hiring to displaced workers from the area, and to tie the vocational-school and union officials directly into the interviewing of workers who might need defense training.

A somewhat different pattern of action has been developed to meet the problem of disemployment resulting from closing of plants affected by priorities on raw materials. Since the entire United States output of aluminum is imperatively needed for the manufacture of aircraft, the aluminum-ware industry was the first to be affected on a large scale by shortage of raw materials. Manitowoc, Wisconsin, is an important center of the aluminum-ware industry. Except for a small shipyard it is a one-industry town. On the basis of the action taken to remedy the situation in that city, a pattern was developed, implemented by an executive order establishing machinery which will serve to speed up similar measures for other industries affected by priorities, such as automobiles, tires, silk, refrigerators, washing machines, electric appliances, stoves, metal office furniture, talon fasteners, and coin slot machines. The plan for the spread of defense work among non-defense plants is as follows:

(1) The Labor Division of the War Production Board, through its experts, investigates any situation in which it appears that a community is going to suffer because of a shutdown of any nondefense plant, or heavy layoffs, owing to curtailment of supplies. It uses its own experts, the staffs of the 1500 State Employment Offices, and the field forces of other state and federal agencies. A report is made as quickly as the facts can be obtained from the interested employers, labor unions, civic leaders, and others. (2) The Labor Division reports the "essential facts" to the Contracts Distribution Service of the War Production Board, which has been specifically directed by an executive order of the President to investigate the possibilities of placing defense orders in nondefense plants. This new service will assign its engineering and technical experts to determine quickly what a specific plant can do for defense. (3) On the basis of these two quick surveys, the War Production Board certifies to the War and Navy Departments the facts it finds: the number of workers to be displaced, and the specific machin-

ery and other items in the factory that can be used for defense production. If the study demonstrates that the community should be certified for special consideration, the army and navy are asked to accord that consideration. (4) The Secretaries of War and Navy issue "special directives" to their purchasing divisions, authorizing them to negotiate contracts (instead of awarding them on competitive bids), at prices up to 15 per cent above the minimum price, and waiving bid bonds and other normal requirements. Purchasing offices also may place in contracts with "prime" contractors a requirement that a certain percentage of the job be "farmed out" to smaller subcontractors.

Machinery has been set up to implement this program. Field offices of the Contracts Distribution Service have been set up in a large number of cities, to which any small factory can describe its possibilities for defense manufacturing. These offices also will make technical surveys. A special contracts-distribution service has been organized in the War Department. Regional committees have been set up jointly by the War Production Board and by the United States Employment Service to make the necessary surveys. The 1500 public employment offices have been instructed to report immediately to Washington current or anticipated layoffs or shortening of average weekly hours in order that appropriate action may be planned as far in advance as possible.

The Labor Relations Branch of the War Production Board has been delegated to work with representatives of organized labor in meeting displacement problems which involve seniority both in the lay-off procedure and in making agreements for rehiring. It assists in developing their coöperation and participation in registration and reëmployment through the Employment Service and in working out adjustments in connection with the transfer of workers from the jurisdiction of one union to another union or any other problems in which union policies, procedures, or structures are involved.

A notable advance was made when all the large automobile producers accepted a plan which protects the seniority rights of workers transferred from automobile plants to defense jobs. In addition, seniority rights which previously had been recognized only on a plant basis in the automobile industry were extended to cover all plants belonging to a large company.

## THE TRAINING PROGRAM

During the past decade or more the supply of skilled workers had dwindled appreciably. In the face of the unemployment prevalent throughout the thirties, neither management nor organized labor was interested in extensive apprenticeship or other training programs. In consequence, the beginning of the defense program found the country with a very inadequate reserve of men skilled in the operation of metal-working machines and in many other complex tasks that are involved in the production of mechanized equipment for war. It was obvious from the first that a training program of broad dimensions would have to be put into operation with the utmost speed. A large number of agencies were called upon to coöperate in this program.

*Training Within Industry*

One of the swiftest and most successful means by which needed labor skills can be developed is by training given on the job. The Labor Division established a special branch known as Training-Within-Industry to assist defense industries to meet their man-power needs by training workers in the plant to make the fullest use of their best skills. This program has four main phases:

First, great emphasis is placed on upgrading of all classes of personnel as their experience and abilities warrant, through planned job progression, job rotation, and intensive instruction both on and off the job. Job progression may take the form of promotion from within or transfer to work for which the employee is better fitted. Job rotation insures development of a reasonably flexible and versatile work force. A second phase is the development of production specialists through intensive instruction on the job. Third is the development of all-round skilled mechanics through trades apprenticeship, carried on in coöperation with the Federal Committee on Apprenticeship. This is separate from production-worker training and is designed to develop a predetermined, limited number of all-round journeyman mechanics. The development of supervisors is the fourth main phase. This is accomplished through careful selection, assignment of supervisory duties of increasing responsibility, and provision for discussions and conferences under both plant and outside auspices.

The establishment of a policy of upgrading in industry is an important development from the long view, apart from its value for expediting defense production. On the other hand, job dilution, which is being practiced in a number of defense industries, should be considered a temporary action taken in the face of acute shortages of workers with certain skills. Job dilution involves the subdivision of an operation usually performed by an all-round skilled worker into several operations that can be performed by workers that have only specialized or unit skills.

Through its district offices, the Training-Within-Industry Branch provides, on request by defense plant employers, advisory technical assistance in job-and-worker-analysis to point the way toward upgrading and unit-skill specialization. It aids in analyzing training needs and in setting up a program within the plant to meet those needs. Provision is made for the exchange of experience of employers who have met similar problems.

A Federal representative is in charge of each of the Training-Within-Industry district offices. Borrowed from industry, he was selected for his background in production and industrial relations. Associated with him are four advisers, two representing labor and two representing management. These advisers attempt to stimulate among employers and employees wider interest in the benefits of training.

The *Federal Committee on Apprenticeship* of the United States Department of Labor is responsible for the promotion of apprenticeship training of workers for the skilled trades. Through field representatives it develops and recommends standards of apprenticeship for these trades and provides specialized assistance to management and labor groups in initiating and servicing programs of apprenticeship. The Committee encourages the establishment of joint management-labor committees to assist in carrying out the apprenticeship program.

The *Vocational Training Section* of the United States Office of Education is responsible for the promotion and financing of the major part of the vocational-training program for defense workers operated by the public schools. Through regional and field agents, it coöperates with the state and local boards of vocational education in the administration and supervision of

this program. Defense training may be given only for those occupations approved by the Office of Production Management.

Supplementary and extension courses are provided for employed workers for the purpose of expanding the skill and knowledge of those persons in essential defense occupations. There is close coördination with the Training-Within-Industry and Apprenticeship programs in the establishment and operation of these courses. In the certification of funds for equipment for vocational schools, the Office of Education gives first consideration to facilities for supplementary courses.

Preëmployment vocational courses are provided for unemployed persons selected from the Employment Service registers, from Work Projects Administration projects, and National Youth Administration projects. In general, the number of persons to be given preëmployment training is restricted to the number of jobs in defense industries which are now open or may be open within a reasonable time. Where there are shortages of applicants for the training courses in some communities, other localities may enjoy a surplus of persons who can be referred for training. In a few instances, therefore, the Employment Service has arranged to have workers trained in their home communities and then through clearance referred to jobs in other localities where they are needed.

The *Engineering, Science, and Management Defense Training Section* of the United States Office of Education provides engineering and science courses at college level for workers with two or more years of college training, and some business administration courses, designed to meet the shortage of engineers, chemists, physicists, and production supervisors in fields essential to the national defense. Many colleges and universities have set up short courses of this type to meet defense needs within these strata of professional and technical occupations. Federal funds are certified to cover the cost of approved courses.

The *National Youth Administration*, in addition to its non-defense activities, carries on an out-of-school work program for needy unemployed youth between the ages of 17 and 24, inclusive, utilizing both resident and workshop projects. These young persons receive work experience and training in specific defense occupations for which there is a predictable demand. Among the fields in which production experience is given are machine-shop work, welding, sheet-metal work, foundry, and forging.

The *Work Projects Administration*, in addition to its regular function of full-time work for the primary wage earners of needy families on public projects, also has the authority to provide training for manual occupations in industries engaged in production for national defense. A reemployment and training program has been established to effectuate more extensive and intensive coöperation with the State Employment Services, to assure more complete placement consideration of WPA employees, and to provide for short periods of worker training in defense plants.

#### LABOR SUPPLY COMMITTEES

By executive order of the President, the Labor Supply Branch of the Labor Division has been authorized to direct and coördinate the activities of all Federal agencies represented in the Labor Supply Branch in order that an adequate supply of skilled personnel may be available to meet the needs of defense production. Most of the principles and objectives of the Labor Supply Branch have already been indicated in the course of the discussion of the machinery for placement and various measures for full utilization of available workers. However, since all action in regard to the mobilization of the labor resources of the nation will henceforth be directed by this Branch, it would seem useful to restate those principles, following a summary review of the agencies that are actively associated in its work.

Five other branches within the War Production Board coöperate closely with the Labor Supply Branch: the Labor Relations Branch, the Priorities Branch, the Negro Employment and Training Branch, the Minorities Branch, and the Bureau of Research and Statistics. A similar working relationship is maintained with the Bureau of Labor Statistics of the United States Department of Labor, and the Division of Research and Statistics of the Bureau of Employment Security in the Social Security Board. Representatives from these units participate in the day-to-day functioning of the Labor Supply Branch both in Washington and in the various states and in local communities. Coöperation of the following additional agencies at the regional, state, and local levels makes it possible to anticipate labor supply and displacement problems before they become acute, thereby permitting corrective measures to

be undertaken with speed: United States Employment Service; United States Civil Service Commission; Training-Within-Industry Branch; Federal Committee on Apprenticeship; United States Office of Education, National Youth Administration, and Work Projects Administration.

Briefly stated, the labor-supply objectives and principles which have been adopted to date are as follows:

The effective conduct of any aspect of the defense program requires the full coöperation of management, labor, and government.

The official defense-employment agency of the War Production Board is the United States Employment Service.

Defense contractors are to use public employment offices for the recruitment of workers.

Full use of *all* reserves of local labor is necessary before initiating recruitment of labor from outside the local labor-market area.

Defense contractors are not to advertise for labor, locally or otherwise, without first consulting the local public-employment offices as to the necessity for such action.

Defense training is to be established only in occupations approved by the War Production Board.

Defense contractors and government manufacturing establishments are to use the services of the Training-Within-Industry Branch, Labor Division, War Production Board, and the Federal Committee on Apprenticeship Training of the Department of Labor, to insure the maximum use of their man power.

There shall be no discrimination in the employment or training of workers in defense industries or government because of sex, race, creed, color, or national origin.

All work carried on as part of the defense program is to comply with Federal statutory provisions affecting labor wherever such provisions are applicable. This applies to the Walsh-Healy Act, the Fair Labor Standards Act, the National Labor Relations Act, etc.

To implement these objectives, twelve Regional Labor Supply Committees have been established. The Regional Representative of the Bureau of Employment Security serves as

Acting Chairman of each of these districts. Wherever the governmental units participating in the work of the Labor Supply Branch have regional representatives, these representatives participate in the work of the Regional Labor Supply Committees. In addition, each Committee has representatives of labor and of management. Representation from other governmental agencies, such as the Civilian Conservation Corps and federal manufacturing establishments, and from large defense contractors, may be invited when their coöperation or services are desired.

The primary over-all objective of the Regional Labor Supply Committees is to get collective action for the most effective recruiting, training, and placement to supply workers of the skills and at the time and place required for smooth operation of defense industries. To that end, the Committees are responsible for determining the needs of defense industries in the region, for formulation of plans, for providing necessary services, and for securing collective action of constituent agencies in the execution of those plans. They report to the War Production Board on progress and problems, recommend additional services or actions that may be needed, and review the effectiveness of the training and placement program.

The Regional Labor Supply Committees are charged particularly with the duty of maintaining contact with the chief executives of defense establishments in order to obtain: (1) use of the employment service to fill defense jobs and to control disruptive recruitment practices; (2) detailed reports of future labor needs; (3) job adjustments and acceptance of unit-skilled trainees; (4) training in the plant and upgrading; (5) vocational defense training and employment of trainees; and (6) registration and voluntary transfer of employed workers, when necessary.

From organized labor the Regional Labor Supply Committees seek coöperation in obtaining registration and placement of union members by employment offices and job simplification in the establishment and operation of training courses. The Committees also work in coöperation with organized labor to facilitate transfer of employed workers, when necessary, and to secure removal of discriminatory employment practices.

Similar Labor Supply Subcommittees have been organized for a large number of cities and states, in order to expedite

further the organization of the local labor supply to meet the immediate needs of defense contractors. Most members of these committees can contribute to the solution of specific problems an intimate knowledge of the local labor markets.

Such is the machinery which has been set up to mobilize the labor resources of the nation for the production of war materials. Unquestionably many modifications will be introduced to increase the general effectiveness of the labor-recruitment and training activities and to meet special problems as they arise. It seems reasonable to expect, however, that the present operating arrangement of the Labor Supply Branch and the constituent Committees, with emphasis on the coöperation of government, labor, and management, will continue to be the organizational framework throughout the emergency, and possibly may remain during the postwar period of reconstruction.

## THE NATIONAL DEFENSE LABOR POLICY— SUPPLY, WAGES, AND STRIKES

*Earl G. Latham*

THIS paper proposes to discuss some aspects of labor policy in the national defense program under the following heads: (I) a comparison between 1917 and 1941; (II) problems of policy in respect to (1) the training and supply of workers; (2) wages; (3) strikes; (4) the instruments of administration; (III) some concluding observations.

### COMPARISON BETWEEN 1917 AND 1941

The war effort of 1917 and the defense effort of 1941 have many characteristics in common, but in the field of labor relations, the contrasts are frequently striking. Perhaps the strongest of these are (1) the relative supply of skilled and unskilled workers in the two periods; (2) the composition of the organized labor movement; (3) the conception of the place of the trade union in society as symbolized by the existence of institutions for its protection; (4) worker attitudes toward the national effort.

#### *The Supply of Skilled and Unskilled Workers*

One of the chief immediate needs in 1917 was a supply of unskilled workers.<sup>1</sup> The chief labor shortage in 1940 and 1941 was a scarcity of skilled workers to retool plants for wartime production. In 1917 the United States had been a principal market for war supplies for a period of three years. American factories had been making munitions and other war goods for the use of European armies many months before it was thought necessary to turn that production to the uses of the American army.

<sup>1</sup> Gordon S. Watkins, *Labor Problems and Labor Administration in the United States During the World War* (University of Illinois, Studies in the Social Sciences, September 1919), pp. 50 ff. There was, of course, an increased demand for all kinds of labor, but there was some dispute as to whether an actual labor shortage existed, the Secretary of Labor taking the position that the problem was rather one of the proper distribution of the existing supply. There were, however, shortages in particular industries and localities, a condition aggravated by excessive turnover. *Ibid.*, p. 59.

By 1940, however, ten years of depression and the development of new technologies had affected the labor supply. Millions of workers were being cared for by relief agencies, and the replacement of skills had been discouraged in many fields. The recruitment of foreign skilled workmen had been made difficult by the Johnson Act of 1924, which had shut off the flow of immigration to the United States. Union policies in some of the skilled crafts had sought to protect the union memberships by restricting the training of apprentices. Technology had made many of the older skills unnecessary.

The shortage of unskilled workers in 1917 was felt in some quarters to be so acute that demands were made that a supply be obtained from the Caribbean Islands and the Orient.<sup>2</sup> In 1940 there was a plenitude of unskilled labor. Although European importations had been restricted, American entrepreneurs had utilized native sources hitherto untapped. The depression years had forced many onto the relief rolls, but new demands for workers and the curtailment of the WPA sent them back to industry, although some estimates have discounted their efficiency by 25 per cent.<sup>3</sup>

The demand for unskilled labor in 1917 and the substandard level of prewar wages for this group made the rise in the wage level of common labor a sharp one.<sup>4</sup> The situation was aggravated by military conscription as well as by the shutting off of immigration because of the war. This contributed to the high cost of living, which was such a grievous calamity to most of the civilian population. That the inflation was not more serious can be attributed to the relatively short term of the war.

#### *The Composition of the Trade-Union Movement*

The orthodox trade-union movement in 1917 was unified in the American Federation of Labor. The railroad brotherhoods maintained their autonomy and independence (as is still the case), but they coöperated with the Federation. Recent years, however, have witnessed a split in the labor movement<sup>5</sup> for

<sup>2</sup> *Ibid.*, p. 55.

<sup>3</sup> Twentieth Century Fund, Inc., *Labor and National Defense* (New York, 1941), p. 5.

<sup>4</sup> Alexander M. Bing, *War-Time Strikes and Their Adjustment* (New York, 1921), p. 274.

<sup>5</sup> J. R. Walsh, *CIO: Industrial Unionism in Action* (New York, 1937).

which the only comparable American precedent is, perhaps, the emergence of the American Federation of Labor while the Knights of Labor was still a functioning organization.

The importance of the Congress of Industrial Organizations is considerable, as one can see from the distribution of the component unions. The struggle for organization has taken place chiefly in the steel, automobile, aircraft, aluminum, metal parts and products, lumber, and shipbuilding industries.<sup>6</sup> These industries present problems of union organization which have been bitterly contested since the creation of the CIO in 1935, and these industries, of course, are intimately concerned with various phases of the defense production program.

Although the total number of organized workers in 1941 was about three times the number in 1917, this has not meant that the possibilities of the peaceful settlement of labor disputes are tripled.<sup>7</sup> Much of the increase is the result of union organizations which have come into existence since 1933. The leaders of such organizations frequently exhibit lack of experience in the politics of negotiation and a tendency to make extreme commitments from which it is hard to withdraw. Many have well-developed administrative talents and manage the affairs of the new unions with skill. Others, however, have an overabundance of missionary zeal, useful in the organizing stages of a union drive, but difficult to harness to the routines of trade-union administration. New unions are frequently less disciplined than well-established organizations and are consequently less stable.

The work of the leaders of the new unions is complicated by the fact that, although there is organization in industries from which unions were virtually excluded before 1933, the organization is still incomplete. A complete degree of organization or a complete absence of organization would create a stability which is difficult to achieve under conditions of imperfect and incomplete organization. The bargaining position of a union in an industry which is only partly organized is weakened by the competition of the unorganized plants. The pressure is always on the organized employer to reduce his costs so as to compete with the unorganized employer. A failure to meet the reason-

<sup>6</sup> United States Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review* (hereinafter cited as *Monthly Labor Review*), April 1941, pp. 948-949.

<sup>7</sup> This point is also made in *Labor and National Defense*, *op. cit.*, p. 84.

able demands of a trade union creates those tensions which lead to strikes and other interruptions of production.

The new unions not only have to meet the resistance of employers but the opposition of the older unions in the Federation as well. The history of the union movement since 1935 has been the story of a great organizing campaign complicated by disputes between the AFL and the CIO over claims to workers.<sup>8</sup> These disputes have loosely been called "jurisdictional," but properly speaking they are not. A jurisdictional dispute is one between unions owing allegiance to a common union governing body as, for example, between the Carpenters and the Machinists of the Federation. The AFL-CIO disputes are interunion quarrels. There exists within the Federation machinery for the settlement of jurisdictional disputes. Only the public authorities (such as the National Labor Relations Board) can settle an interunion controversy. This is a somewhat ungrateful task, as the experience of the National Labor Relations Board will attest.

#### *New Conceptions of the Role of the Trade Union*

One of the most conspicuous differences between 1917 and 1941 was the changed conception of the place of the trade union in society as symbolized by the existence of legal institutions for its protection. These institutions represent the prevailing view that trade unions supply social and cultural values worth encouraging through legislation. In 1917 collective bargaining had few legal protections. Efforts had been made previously in the railroad field and in some of the states to protect by statute the rights to organize and to bargain collectively, but these efforts had come to nothing.<sup>9</sup> The attempt by Congress to relieve trade unions of some of the strictures of the antitrust law was of recent memory, but it was not to be known until after the war how small a change had actually been accomplished.<sup>10</sup> Seven months before the American declaration of war, the Congress, under pressure, had enacted what was virtually a

<sup>8</sup> W. Galenson, *Rival Unionism in the United States* (New York: American Council on Public Affairs, 1940).

<sup>9</sup> The labor provisions of the Erdman Act of 1898 (30 Stat. 424) were declared unconstitutional in *Adair v. U. S.*, 208 U. S. 161 (1908). See also *Coppage v. Kansas*, 236 U. S. 1 (1915).

<sup>10</sup> *Duplex Printing Press Company v. Deering*, 254 U. S. 443 (1921); *American Steel Foundries Company v. Tri-City Trades Council*, 257 U. S. 184 (1921).

wages fixation statute for railroad workers, but this was admittedly exceptional.<sup>11</sup>

The War Labor Board of 1918 adopted as a principle of decision the "right of the workers to organize and to bargain collectively with their employers," but this statement was limited to the duration of the war and, at best, was merely hortatory.<sup>12</sup> Recognition of the principle was secured by the industrial power of the government, as both producer and consumer of industrial products,<sup>13</sup> and by war psychology. Upon one occasion, however, labor difficulties resulted in the governmental management of a utility which refused to acknowledge the principles of the War Labor Board.<sup>14</sup> In the ordinary case, the enforcement of the principles announced by the War Labor Board depended upon the indirect compulsions of political influence and patriotism. This was manifestly a temporary condition, yet no policy was available for the transition to a nonwar economy. The result was apparent in the tremendous strikes in the steel, coal, and railroad industries in 1919 and later.<sup>15</sup> In the railroad industry some effort was made to maintain principles of organization and collective bargaining in the Esch-Cummins Transportation Act of 1920,<sup>16</sup> but for the most part this failed to achieve any tangible result.<sup>17</sup> It was not until 1926 that Congress belatedly repaired the omissions of the Act of 1920.<sup>18</sup>

Fifteen years after the War Labor Board, Congress wrote statutory guarantees of the rights to organize and to bargain collectively.<sup>19</sup> Section 7a of the National Industrial Recovery Act declared it to be the policy of the United States to protect workers from interference, coercion, and restraint in organizing labor unions and bargaining collectively.<sup>20</sup> Successive labor

<sup>11</sup> *Wilson v. New*, 243 U. S. 332 (1917).

<sup>12</sup> *Monthly Labor Review*, August 1918, p. 65.

<sup>13</sup> Bing, *War-Time Strikes*, *op. cit.*, p. 276.

<sup>14</sup> *Ibid.*, pp. 106 ff. The Western Union Telegraph Company was taken over and operated by the federal government when it insisted upon the right to discharge workers because of their membership in trade unions.

<sup>15</sup> See, for example, Interchurch World Movement, *Report on the Steel Strike of 1919* (New York, 1920).

<sup>16</sup> 41 Stat. 456 (1920).

<sup>17</sup> H. D. Wolf, *The Railroad Labor Board* (Chicago, 1927).

<sup>18</sup> 44 Stat. 577 (1926). See also the 1934 amendments, 48 Stat. 1186 (1934).

<sup>19</sup> In 1932 Congress adopted the Norris-LaGuardia Anti-Injunction Act (47 Stat. 70), which restricted the jurisdiction of the federal courts in issuing injunctions in labor disputes and especially in cases involving antiunion contracts of employment.

<sup>20</sup> 48 Stat. 198 (1933).

boards under the National Recovery Administration spelled out this policy in specific cases.<sup>21</sup> Section 7a of the National Industrial Recovery Act was salvaged out of the wreckage created by the Schechter decision,<sup>22</sup> and the National Labor Relations Act of 1935 perpetuated its guarantees.<sup>23</sup>

The National Labor Relations Board has been the main instrument of national labor policy since 1935. Its duty has been to enforce a list of prohibitions against certain employer practises labeled "unfair." Functionally, the provisions of the Act equip the Board to deal with labor problems in the three main stages of trade-union development, organization, representation, and negotiation, although its powers in the third of these are somewhat deficient. It can correct employer discriminations against workers when the motivation is an anti-union attitude; it can order the disestablishment of company-dominated unions; and it can hold plant elections to determine majority representatives for purposes of collective bargaining. It cannot assist unions in the negotiation of collective agreements, however, except through its power to order an employer to cease and desist from refusing to bargain collectively. The delicate tasks of mediation are left to the Conciliation Service of the Department of Labor.

#### *Worker Attitudes Toward the National Effort*

One result of this policy of governmental support to trade-union organizations and to the principle of collective bargaining has been an increased determination not to relax the social gains thus achieved. Labor unions feel that they have won an important victory after years of struggle, and this is undoubtedly true.<sup>24</sup> This feeling, however, has implications for the national defense program. It can complicate the administration of a program which seriously curtails those rights.<sup>25</sup> A strong labor movement can be a force for obstruction or co-

<sup>21</sup> Lewis L. Lorwin and Arthur Wubnig, *Labor Relations Boards* (Washington, 1935).

<sup>22</sup> *Schechter Poultry Corporation v. U. S.*, 295 U. S. 495 (1935).

<sup>23</sup> 49 Stat. 449 (1935).

<sup>24</sup> The British Trades Union Congress of 1940 showed somewhat the same feeling. See *Monthly Labor Review*, January 1941, pp. 154-155, for a summary of the resolutions adopted by the Congress, including one to repeal the Trades Dispute and Trade Union Act of 1927 as an aid to the war effort.

<sup>25</sup> See Bing, *War-Time Strikes*, *op. cit.*, pp. 236 ff., for labor attitudes during the first World War.

operation in a way impossible to an equal number of unorganized workers. The first published Industrial Mobilization Plan of the War Department recognized this fact by declaring that the Labor Administrator should be "labor's advocate and representative in the highest executive circles," although later versions of the Plan revealed some indecision on this point.<sup>26</sup>

#### PROBLEMS OF LABOR POLICY

The coöperation of trade unions is especially needful in three aspects of the defense program: the training and supply of skilled workers; the stabilization of wages; and the avoidance of strikes which threaten to interrupt the defense program.

##### *The Training and Supply of Workers*

In 1917 and 1918 the chief difficulty in the training of an adequate labor supply lay in the absence of facilities for such training. The training of skilled workers was undertaken in part by the Training and Dilution Service of the War Labor Administration,<sup>27</sup> but the most effective instruction was offered in the so-called "vestibule schools" maintained by private industry.<sup>28</sup>

The chief problem of 1941 was not a lack of institutions devoted to worker training, but a lack of coördination in their use. Indeed, this problem is the most important of all the labor problems dealt with by the administrative agencies engaged in the national defense effort.<sup>29</sup>

The training programs afford not only a means of relocating and augmenting the supply of skilled labor for defense employment but a means of cutting the real cost of defense. If non-defense industries refrain from bidding against the defense industries for the available supply of skilled workers, but instead concentrate upon training, it may make possible a simultaneous expansion of defense and nondefense production.<sup>30</sup>

<sup>26</sup> Harold J. Tobin and Percy W. Bidwell, *Mobilizing Civilian America* (New York: Council on Foreign Relations, 1940), p. 133.

<sup>27</sup> Watkins, *Labor Problems and Labor Administration*, *op. cit.*, p. 215.

<sup>28</sup> William Boutwell et al., *America Prepares for Tomorrow* (New York, 1941), p. 272.

<sup>29</sup> For details of the agencies concerned with mobilizing and coördinating the labor resources of the country, see D. H. Davenport, "Mobilization of Labor Resources for the Defense Effort," pp. 145-151 of this volume.

<sup>30</sup> Sumner Slichter, "National Labor and Production Policies," *Proceedings of the Academy of Political Science*, January 1941, p. 80.

Such a result would help other programs for avoiding inflation.

The recruitment of a labor supply has presented other problems besides those concerned with the training of skilled workers. Among these are military conscription, the agricultural worker, worker migration, women in defense jobs, Negro and other discriminations, and priorities unemployment.

In the spring of 1941, some months after the launching of military conscription, the Director of Selective Service obtained from the OPM an analysis of the skilled-labor requirements in defense industries, at least so far as the classification of essential occupations was concerned.<sup>31</sup> Shortly afterward the War Department announced plans for the release of soldiers who had held key positions in industry prior to enlistment or induction and whose services were required by their employers because of the expansion of defense activities or the shortage of skilled workers. Many, if not most, of these were workers who should not have been inducted in the first place, but who had been classified for induction by draft boards which had tried to operate without sufficient standards.<sup>32</sup>

The problem of the agricultural worker who wants a defense job is more difficult to solve than that of the defense worker who has been inducted into military service. Reserves of agricultural labor can be effectively utilized only through a more widespread distribution of defense industry in areas of surplus and the creation of training programs such as exist for unemployed industrial workers.<sup>33</sup> There are good reasons for making a wider geographical distribution of defense contracts, and not the least of them is the fact that such distribution will tend to deter worker migration. As yet there has been no large-scale worker migration such as attended the war effort in 1917 and 1918.<sup>34</sup> Migration tends to create a high labor turnover, which is costly, and does create problems of health and sanitation in areas already inadequately served in housing

<sup>31</sup> *Defense*, May 20, 1941, p. 12; June 10, 1941, p. 7.

<sup>32</sup> The "work or fight" order of May 17, 1918, was a use of the selective-service system to augment the labor supply of essential industries. It required those who were wholly idle or engaged in nonessential occupations to take work in an essential occupation or be inducted immediately into the army. John Dickinson, *The Building of an Army* (New York, 1922), pp. 161-167. On the question of labor conscription, see Francis Hoague, Russell Brown, Philip Marcus, "Wartime Conscription and Control of Labor," 54 *Harvard Law Review* 50 (1940).

<sup>33</sup> See Speech of Dr. J. K. Galbraith to the National Farm Institute at Des Moines, Iowa, February 21, 1941, reported in *Defense*, March 4, 1941, p. 12.

<sup>34</sup> Watkins, *Labor Problems and Labor Administration*, *op. cit.*, pp. 59-63.

facilities. So far as it is possible to do so, the remedy is to see that every local worker is trained locally and employed locally.<sup>35</sup> If worker migration should become acute, it would be feasible to require employers to recruit their labor through the public agencies, and to forbid the interstate transportation of workers without license.<sup>36</sup>

Though there has not yet been a large-scale migration of workers, there has been some importation of out-of-state labor by employers experiencing local shortages of skilled workers. Efforts have been made to discourage this practice by recommending the use of women workers.<sup>37</sup> It has been the experience of the aircraft industry that women are competent in many mechanical operations, and radio, electrical-manufacturing, and small-parts companies have also employed women with success.<sup>38</sup> In some areas, however, the employment of women has been resorted to without justification. Good workers have been available, but have not been employed for reasons of race or nationality. This has been particularly true of Negro workers, although some employers have enforced citizenship requirements in occupations where it is not necessary. The discriminations have been serious enough to evoke some measure of control.<sup>39</sup>

### *Wages*

Although the mechanism of prices frequently is not relied upon to provide the customary allocation of the resources of industry in times of war or defense effort, there is more hesitation to fix wages. One reason for this hesitation is the association of wage fixing with compulsory arbitration and denials of

<sup>35</sup> Isador Lubin, "A Labor Policy for the Emergency," *Proceedings of the American Academy of Political Science*, May 1941, p. 58.

<sup>36</sup> Compare with the regulations given in the *Seventh Annual Report of the Secretary of Labor*, 1919, pp. 266, 267.

<sup>37</sup> *Defense*, August 5, 1941, p. 17.

<sup>38</sup> For an account of the principles and problems involved in the employment of women in the first World War, see *Monthly Labor Review*, November 1918, pp. 182 ff.

<sup>39</sup> Executive Order No. 8802, June 25, 1941, required all contracting governmental agencies to obligate the other contracting party not to discriminate against workers because of creed, color, race, or national origin. At the time of the executive order there already existed in the OPM Labor Division an agency known as the Negro Employment and Training Branch. Since the creation of the Committee on Fair Employment Practice it has been a routine of the Negro Employment and Training Branch to submit reports to it, although the Committee is not limited to information from this source.

the right to strike.<sup>40</sup> Yet some form of stabilization of wages should be considered if other controls for avoiding inflation are to be made effective. Although wage adjusters in 1918 tended to relate increases to the cost of living,<sup>41</sup> there is reason to suppose that a rising cost of living in a defense economy is not a sign that wages should be raised but rather a sign that demand is outrunning the capacity of the consumption-goods industries.<sup>42</sup> Without an increase in this capacity, wages may be wasted in futile bidding.

Assuming the desirability of some form of stabilization of wages, the chief question then concerns the technique to be employed. Three forms of stabilization may be considered, including both voluntary and coercive controls.

Stabilization agreements, such as have been worked out by the Labor Division of the OPM for shipbuilding and defense construction,<sup>43</sup> are voluntary commitments by employers and unions and represent a substantial achievement of collective bargaining. Moreover, they help to produce stability of working relations in industries of immediate importance to national defense. The inclusion of conciliation and arbitration features promotes the development of practices of orderly negotiation.<sup>44</sup> Perhaps the main purpose and probable effect of such agreements is to avoid interruption of production. The fixing of wages for a definite term should assist in making price controls more effective during the period covered. However, since wage adjustments are measurable by the cost of living, it is likely that such agreements would tend to keep wages up rather than prices down.

A second method of wage stabilization has as its purpose the reduction of consumer spending.<sup>45</sup> Canadian regulations adopted in December 1940 are an example of this method.

<sup>40</sup> See *Monthly Labor Review*, April 1941, p. 827, for a description of the wartime arbitration machinery in Australia.

<sup>41</sup> Bing, *War-Time Strikes*, *op. cit.*, pp. 193 ff.

<sup>42</sup> Slichter, *National Labor and Production Policies*, *op. cit.*, p. 81.

<sup>43</sup> For voluntary stabilization, see Davenport, *op. cit.*, pp. 138-139. See *Monthly Labor Review*, March 1941, pp. 546 ff., for a summary of no-strike clauses in union agreements.

<sup>44</sup> But see the Labor Policy Advisory Committee condemnation of an outlaw strike in violation of the agreement, *Defense*, June 10, 1941, p. 7.

<sup>45</sup> For a summary of the Canadian regulations, see *Monthly Labor Review*, February 1941, pp. 332, 333, and June 1941, pp. 1391-1393. The program can be extended and the details of regulation changed (*Minneapolis Star-Journal*, October 19, 1941) without impairing the usefulness of the example.

Under those regulations, the wage-rate levels determined by practice or agreement in any industry or trade, nationally or locally, in the years from 1926 to 1929 (or higher levels fixed after that time but before December 16, 1940) are regarded as generally fair and reasonable.<sup>46</sup> Exceptionally low rates or abnormally high rates in the base period may be adjusted to some more "reasonable" level. In short, the highest rates paid in the base period are regarded as standard unless they were abnormally low or high.

Adjustments to increased costs of living take the form of a wartime cost-of-living bonus independent of the basic wage rates. The bonus is granted to workers to protect them from increases in the cost of the basic necessities of life only, and not from increases in the cost of all purchases. It is a flat bonus and is not measured as a percentage of earnings or rates. The purpose of such controls is to produce a decline in the consumption of nonessential commodities. It is assumed that a wage of \$25 a week will leave a family little or no margin for expenditures beyond those made for the basic necessities. The flat bonus is calculated in terms of this standard, and increases as the cost of living increases.

The differences between this form of wage stabilization and that represented by the stabilization pacts lie in the different ends to be served. The primary aim of the stabilization agreements is to avoid strikes; that of the Canadian regulations is to reduce consumer spending. The latter takes into account not only the cost of living but the standard of living which is to be maintained. It is conceivable that under the stabilization pacts future wage adjustments might try to compensate for increases in the cost of all of the purchases of the worker. The cost-of-living bonus geared to a \$25-a-week standard would compensate for no more than the increases in the costs of the basic necessities.

The third method of wage stabilization would freeze by governmental order all wages and prices as of the date of the order, with such subsequent adjustments as justice or economic policy might require.<sup>47</sup> It recognizes that to increase wages to meet

<sup>46</sup> It is required that comparisons shall be made on the basis of rates, not earnings, and other considerations, such as guarantees of employment or a longer or shorter work week, have no import.

<sup>47</sup> This view has been expressed by Bernard M. Baruch in testimony before the House Banking and Currency Committee, September 19, 1941, as reported in the *New York Times*, September 20, 1941, p. 6.

higher prices and then to increase prices to help pay for the higher wages, and so on, is the familiar *Teufelskreis*. It further assumes that piecemeal price fixing and wage stabilization are ineffective to control inflation. It also assumes that sanctions are necessary to the success of any scheme for control of wages and prices, and that wages cannot be stabilized by promises to keep the peace, nor price levels maintained by cajolery and threats alone.

These methods of wage control have varying degrees of usefulness. The existing private machinery for the stabilization of wages and working conditions should be extended as an aid to the establishment and enforcement of price ceilings. As an administrative device, the codification of standards by private agreement would have the support which a sense of voluntary participation and personal responsibility would afford. If employer federations and national unions could be induced to accept this method generally throughout industry, progress would be made in the development of orderly and stable labor relations.

The reduction of consumer spending has been suggested as a desirable goal by some public officials,<sup>48</sup> but there are other methods of achieving the same result than those involved in the Canadian regulations. Pay-roll taxes levied at the source would be easy to collect. The sale of bonds and savings stamps would effect a diminishment of consumer spending and would tend to create a backlog of purchasing power for the post-emergency period. Some of the desirable features of the Canadian plan could be utilized while avoiding its difficulties if, when employers make wage concessions, workers could be persuaded to accept the concession in the form of a bonus not to be paid out currently but to be deposited in a reserve against unemployment.<sup>49</sup> This would avoid a waste of the worker's wages in bidding up the prices of scarce goods and would make the transition to less abnormal conditions of production an easier one.

<sup>48</sup> Speech of Marriner Eccles at the 34th Annual Convention of the National Tax Association, St. Paul, Minnesota, October 13, 1941, reported in *Minneapolis Star-Journal*, October 14, 1941, p. 13.

<sup>49</sup> This suggestion is made by Slichter, *National Labor and Production Policies*, *op. cit.*, p. 81. For a discussion of English wage problems, see E. A. G. Robinson, "Problems of Wage Policy in War Time," *Economic Journal*, December 1939, p. 641.

The chief contribution of the proposal to freeze all wages and prices lies more in its assumptions than in its program. Wages must be viewed in their relation to prices. Control of one without the other will work serious hardship. The absence of control over either will beget that economic tornado, the inflationary spiral.

#### *Strikes*

The two chief causes of strikes are disputes about wages and the question of union recognition.<sup>50</sup> This is not to say that other issues are not present in strike situations. There is usually a combination of demands and proposals which may include seniority rules, lay-off practices, rehiring, vacations, adjustments of hours, the speed of machines, and many others. Whatever the grievance may be, all strikes interrupt production, and in periods of high feeling, those who seek to devise strike controls are not likely to make distinctions between good and bad stoppages.

Proposals for the curbing of strikes in defense plants have shown a considerable range.<sup>51</sup> Putting to one side those which would make defense strikes acts of "treason" punishable by death, suggestions serious enough to merit consideration have been of two kinds: those which would authorize the Government to take over strike-bound plants and operate them,<sup>52</sup> and those which would require delay before any strike vote could be acted upon. The fact is that both of these methods have been used in the treatment of defense strikes.<sup>53</sup>

The National Defense Mediation Board was established on March 19, 1941, by executive order.<sup>54</sup> It was given no powers of enforcement and was said by an observer to resemble a coroner's jury, set up to ponder serious strikes after they had occurred. This judgment was harsh and inaccurate, but it is

<sup>50</sup> Research Division of the National Labor Relations Board, *Governmental Protection of the Right to Organize* (Washington, 1936), p. 105. See also strike figures in *Monthly Labor Review*, May 1941, pp. 1108-1111.

<sup>51</sup> For a description of British strike controls, see Margaret Schoenfeld, "Development of British War Labor Policy," *Monthly Labor Review*, May 1941, p. 1079.

<sup>52</sup> Compare with the Federal seizure of the Smith and Wesson Company plant in 1918, when the company refused to recognize the competence of the National War Labor Board to consider the issues of a strike. Bing, *War-Time Strikes, op. cit.*, p. 70.

<sup>53</sup> See *Monthly Labor Review*, May 1941, p. 1092, for a comparison of 1940 strike figures with those of other years.

<sup>54</sup> Executive Order No. 8716, March 19, 1941.

true that the Board was intended to take charge only of the disputes certified to it by the Conciliation Service of the Department of Labor. These were the desperate cases which the ordinary routines of administration had failed to solve. After its creation, however, the Board acquired power to consider the cases to be certified to it through the agency of a joint committee of the Board and the Department.

From the outset the Board took the position that the disputants in any labor controversy were under a duty to resort to the national services for conciliation and mediation before calling a strike.<sup>55</sup> Consistently with this view, the Board recommended return to work as a preliminary to mediation.<sup>56</sup> The War Labor Board of 1918 operated upon the principle that the *status quo* should be maintained, but this was not the view of the National Defense Mediation Board. Although it had no power of its own to hold elections, it sometimes recommended that elections should be held to settle disputes about representation.<sup>57</sup> It also recommended proceedings before the National Labor Relations Board to determine whether any provision of the National Labor Relations Act had been violated. The War Labor Board had held that existing closed- and open-shop arrangements should continue for the duration of the war. The Defense Board, however, occasionally recommended that employers should sign union-maintenance agreements where none had previously existed.<sup>58</sup> In at least one instance, the Board refused the request of a union for such an agreement, but not because of any doctrine of the *status quo*.<sup>59</sup> A new War Labor

<sup>55</sup> *Defense*, April 1, 1941, p. 2.

<sup>56</sup> The Board was empowered to offer its good offices in negotiating agreements, to suggest voluntary arbitration, and, when requested by both sides, to designate an impartial arbitrator. If these overtures failed to produce an agreement, the Board could investigate the facts and issues in dispute, publicize them, and make recommendations for settlement.

<sup>57</sup> The Board designated either a state labor relations board or the National Labor Relations Board for this purpose. *Defense*, April 29, 1941, pp. 6, 7; July 1, 1941, p. 12.

<sup>58</sup> See *Defense*, July 29, 1941, p. 7, and August 19, 1941, p. 6, for the recommendation and defense of the union-security clause which was one of the issues in the strike in the Federal Shipbuilding and Drydock plant. A union-security clause requires an employer to discharge any worker whose dues to the union fall in arrears. Not all of the workers need be members of the union, as is the case in a closed-shop arrangement.

<sup>59</sup> The Board refused a request for a union-maintenance clause in the General Motors strike settled May 16, 1941. See *Defense*, May 20, 1941, p. 8. For a further discussion of the Board's position on union membership, see Charles E. Wyzanski, Jr., "Labor Disputes During the War," pp. 182-186 of this volume.

Board replaced the National Defense Mediation Board in January 1942, but its policy in general remains the same as that of the old board.<sup>60</sup>

The numerous temporary agencies and the Department of Labor are not the only governmental authorities interested and involved in the program for the control of labor relations. The National Labor Relations Board and the National Mediation Board continue their respective services. The multiplicity of these agencies, however, and the occasional use of the military in strike situations<sup>61</sup> betoken the absence of a well-conceived national labor policy for times of peace as well as for emergencies. With the National Mediation Board as a pattern and existing facilities as materials, it is possible to describe the elements of a permanent set of arrangements for the execution of national labor policy.

Voluntary techniques can be successful, as the experience of the railroad industry since 1926 attests. Mediation as a permanent policy of labor regulation is not inconsistent with the administrative enforcement of workers' rights under the National Labor Relations Act, and implies no derogation of those rights. There needs to be a coördination of the two, perhaps to the extent of lodging them in the same body.<sup>62</sup> This conjunction would vest in one authority the responsibility for dealing with the three phases of organization, representation, and negotiation, the stages by which trade unions become instruments of collective bargaining. In 1918 the War Labor Board was allowed to use the services of the conciliators of the Department of Labor, assuming responsibility for their supervision and use. The National Defense Mediation Board had no such power. The gap between the Conciliation Service and the Board should have been eliminated, even if it had been necessary to transfer the Service to the Board.

It would help to promote the orderly regulation of labor relations if strike notices were required. The National Defense Mediation Board declared that workers were under obligation

<sup>60</sup> See note 80, below, and Davenport, *op. cit.*, p. 140.

<sup>61</sup> See, for example, the military occupation of the plant of North American Aviation, Inc. *Defense*, May 27, 1941, p. 9; June 10, 1941, p. 4; June 17, 1941, p. 4; July 1, 1941, p. 12; July 9, 1941, p. 9.

<sup>62</sup> See Twentieth Century Fund, Inc., *Labor and the Government* (New York, 1935), ch. xv, for the expression of a similar view. See also E. G. Latham, "Federal Regulation of Collective Bargaining," *George Washington Law Review*, November 1937.

to send notices in writing to the OPM and to the Conciliation Service of the Department of Labor of desired changes in existing agreements, wages, or working conditions, and to give sufficient advance notice of any threatened interruption.<sup>63</sup> Copies of agreements should also be filed so that disputes over renewal may be anticipated. Delays should be required in the calling of any strike arising out of the interpretation of existing agreements or out of the failure to renew agreements.<sup>64</sup> In such cases, strikes would be permissible after a fact-finding body had reported on the issues with recommendations for settlement.

Such a program would rely mainly on voluntary techniques. It would provide continuity in the development of national labor policy and save the necessity of appointing *ad hoc* agencies every time strikes became serious, which has been our way in the past. It would tend to promote the evolution of customary habits of negotiation and the development of orderly processes in the regulation of labor relations.

#### *The Instruments of Administration*

During the year 1918, labor policy and its execution were in the charge of three main agencies.<sup>65</sup> Representatives of national organizations of employers and trade unions were organized as a War Labor Conference Board for the purpose of determining the basic principles which should govern their relations during the crisis.<sup>66</sup> The War Labor Policies Board was an interdepartmental group entrusted with the formulation of policies, the execution of which became the responsibility of each of the departments insofar as it was affected by the decisions reached.<sup>67</sup> The War Labor Board settled labor disputes.<sup>68</sup> These three bodies were part of a War Labor Administration at whose head was the Secretary of Labor.

<sup>63</sup> *Defense*, April 1, 1941, p. 2.

<sup>64</sup> For an account of one of the agencies engaged in the regulation of labor relations in the railroad industry, see W. Spencer, *The National Railroad Adjustment Board* (Chicago, 1938).

<sup>65</sup> See Watkins, *Labor Problems and Labor Administration*, *op. cit.*, p. 158, for an account of the creation of the War Labor Administration.

<sup>66</sup> *Monthly Labor Review*, April 1918, p. 103.

<sup>67</sup> *Monthly Labor Review*, July 1918, p. 23. The members of the Policies Board were representatives of the War and Navy Departments, the War Industries Board, the Shipping Board, the Emergency Fleet Corporation, and the Food, Fuel, and Railroad Administrations.

<sup>68</sup> *Monthly Labor Review*, May 1918, p. 54; August 1918, p. 63; September 1918, p. 27; October 1918, p. 19; November 1918, p. 29.

The present administrative machinery stems from the same statutory source as that which served the former war effort, but the development has been different.<sup>69</sup> A Labor Commissioner was one of the original advisers of the Council of National Defense, having as his province the problems of labor requirements, supplies, and relations. He in turn installed a Labor Policy Advisory Committee which was different from the 1918 agency of the same name in two respects. Its membership was drawn from union labor and not from the departments, and its members had no operating responsibilities.<sup>70</sup>

Three subdivisions of the Labor Commission were organized to perform the functions for which it was brought into being. The Labor Requirements Branch has been occupied with estimates of needed man power. The Labor Supply Branch has tried to match the man and the job, and the Labor Relations Branch has sought to maintain effective industrial relationships, forestall industrial disputes, and assist the Conciliation Service and other established agencies in the field of labor relations when the defense program has been involved.

On January 7, 1941, the Office of Production Management was established and the Labor Commissioner was made an associate director of the new office.<sup>71</sup> The executive order, however, said nothing about transferring the Labor Commission as well as the Labor Commissioner. This was not done until March 17, 1941,<sup>72</sup> at which time one of the tasks of the original Commission, the adjustment of labor disputes, was vested in the National Defense Mediation Board.<sup>73</sup> After the transfer the Labor Commission became known as the Labor Division of the OPM.

New branches were eventually added to the original three.<sup>74</sup> Defense Labor Advisory Committees were organized<sup>75</sup> to co-

<sup>69</sup> 39 Stat. 649 (1916).

<sup>70</sup> The Labor Policy Advisory Committee is made up of representatives of the American Federation of Labor, the Congress of Industrial Organizations, and the railroad brotherhoods. See note 44, above, for an instance of action taken by the Labor Policy Advisory Committee.

<sup>71</sup> Executive Order No. 8629, January 7, 1941.

<sup>72</sup> OPM Regulation No. 5, March 17, 1941.

<sup>73</sup> Although the National Defense Mediation Board was created to adjust labor disputes, the Labor Relations Branch continued to function.

<sup>74</sup> *United States Government Manual*, September 1941, p. 87.

<sup>75</sup> OPM Regulation No. 8, July 8, 1941, set up the Defense Labor Advisory Committees.

operate with a reorganized OPM<sup>76</sup> in the unification of the relationships of OPM divisions with industry. The discharge of workers in the automobile and silk industries made necessary the creation of a Priorities Branch.<sup>77</sup> The aim of the Priorities Branch has been to ease labor dislocations as production is cut in industries affected by priorities. This has involved coöperation with other governmental agencies<sup>78</sup> in increasing the number of subcontractors and the number of schools for the retraining of workers for new jobs. Housing needs for maintaining an adequate supply of labor in defense areas have made necessary the organization of a Defense Housing Branch in the Labor Division.<sup>79</sup>

It is not within the scope of this paper to discuss the myriad changes in the administration of the labor program.<sup>80</sup> Enough has been sketched, however, to indicate the main characteristics of that administration. First, the Labor Division has no statute to enforce; its field of operations is defined by the needs of the defense program as they press for satisfaction. Second, the focus of activity is the personality of the head of the Labor Division. It is this head who must distribute the competences in the absence of any more formal allocation. Third, new branches have been created as the need for them has become evident. Fourth, the work of the Labor Division has been essentially one of coöordination or liaison. Apart from the Training-Within-Industry program, it has had relatively few operating functions, although the stabilization agreements should not be overlooked. Fifth, the functions which it coördinates are not, for the most part, new functions but an enlargement of existing functions.

The increased influence of the organized labor movement is

<sup>76</sup> OPM Administrative Order No. 11, June 24, 1941, created the reorganization. See also *Defense*, July 1, 1941, p. 3; July 15, 1941, p. 4; for a description of the changes effected.

<sup>77</sup> *Defense*, August 5, 1941, p. 4.

<sup>78</sup> OPM Regulation No. 9 established the Defense Contract Service on July 29, 1941. Executive Order No. 8891, September 4, 1941, abolished the Defense Contract Service and established the Division of Contract Distribution within the OPM.

<sup>79</sup> *Defense*, September 23, 1941, p. 21.

<sup>80</sup> Executive Order No. 8875, August 28, 1941, reorganized the defense machinery by creating the SPAB. The order did not mention the Labor Division, although its chief was made a member of the Board. On January 16, 1942, the War Production Board was created, later absorbing the Labor Division of the Office of Production Management. On January 12, 1942, the National Defense Mediation Board was succeeded by the National War Labor Board.

evident in the appointment of a trade-union executive as chief labor administrator and associate director of the OPM. The effectiveness of the work of the Labor Division requires the full coöperation of the unions, especially in the administration of the TWI, priorities unemployment, wages stabilization, and mediation programs. The working conception of the labor problem in 1918 was that of "labor-in-production"; that of the present effort has been "labor-and-production."<sup>81</sup> Worker morale should be fortified by this, for the difference of conception is a token that the social achievements of the recent past are not in discard.

#### CONCLUSION

The War Labor Administration of 1918 was a separate unit under the Secretary of Labor, while labor administration in 1941 was run as a part of the Office of Production Management.<sup>82</sup> As such, the former had a conspicuous existence which the Labor Division has not had. If single words may be used to describe the two administrations, the former could be called "institutionalized," while the latter could be called "personalized." Personalized administration has the merit of flexibility and quick adjustment to the changing needs of a changing program. Institutionalized administration has the merit of a continuity of action which is independent of the personality of any single man. Personalized administration tends to suffer when the individual responsible for it moves around from place to place, acquiring new titles and fresh obligations. However, experimentation and personalization are useful techniques in the early phases of a program, the limits of which cannot be predicted. As the scope of the effort becomes fixed, routines will settle and institutionalization will appear.

<sup>81</sup> Compare *Monthly Labor Review*, February 1918, p. 80, and *Defense*, January 7, 1941, p. 9.

<sup>82</sup> On the subject of uniformity and centralization of labor policy in 1918, see L. C. Marshall, "The War Labor Program and Its Administration," *Journal of Political Economy*, May 1919, p. 425.

## LABOR DISPUTES DURING THE WAR<sup>1</sup>

*Charles E. Wyzanski, Jr.*

### INTRODUCTORY

I AM going to discuss six critical problems that have arisen and will arise in the handling of labor disputes in this war.

- I. When collective bargaining and mediation fails, should the government, as a last resort, require compulsory arbitration for the settlement of labor disputes in vital war industries?
- II. Should an agency dealing with labor disputes decide each case on its merits, or should it be governed by an announced set of substantive policies?
- III. What attitude should be taken by an agency dealing with labor disputes on the issue of union security and the closed shop?
- IV. What attitude should be taken by an agency dealing with labor disputes on the question of wages during this war period?
- V. Should the same agency engage in both labor arbitration and labor mediation?
- VI. Should the agency dealing with labor disputes be composed entirely of public officials or should it be tripartite, with representatives of employers, employees, and the public?

### THE DRIFT TOWARD COMPULSORY ARBITRATION

The problem I first posed was whether, as a last resort, the government should require compulsory arbitration for the settlement of labor disputes in vital war industries.

Before examining that issue as it stands today, we should do well to see how it stood until a short time ago. There can be little doubt that at least up to quite recently the overwhelming majority of informed people in this country were deeply op-

<sup>1</sup> An address given on the Lessing Rosenthal Foundation at Northwestern University, Chicago, January 12, 1942, by Mr. Wyzanski, then a member representing the public on the National Defense Mediation Board.

posed to compulsory arbitration. This was true not merely of union leaders and business men but of disinterested specialists. While they may not have fully analyzed the meaning of the phrase they knew some of its consequences. "Compulsory arbitration" is an ambiguous term which covers two quite different concepts. In one situation, the arbiter is called upon to determine whether a particular practice does or does not conform to an agreed or objective standard. This standard may have been established by contract or by statute or by common practice. In each such case the proceeding is a quasi-judicial arbitration and presents problems quite similar to those which any court is called upon to handle. To this type of determination there is no real hostility anywhere provided the standard is already established. But there is a second and perhaps more usual situation embraced in the term "compulsory arbitration." This is the case where the standard has not already been set by agreement of the parties or by enactment or by usage. Here the so-called arbiter is called upon to develop a new standard and often a new so-called contract and the proceeding takes on a quasi-legislative character. This legislative function dominates even in cases where there is some loose declaration of policy which guides the tribunal.

Disinterested persons have looked upon this quasi-legislative arbitration as a profound alteration in our political system. It marks the intervention of the state in novel fields. When invoked, it avowedly replaces liberty of contract. It casts an administrative official in the role of a lawmaker. And it makes possible determinations which may be so limited in their application as to be necessarily discriminatory, at least in their initial impact.

To labor leaders, the immediate, and intended, effect of compulsory arbitration is to take from them the right to strike. This removes an element that has always been crucial in their thinking, in their talking, and in their economic power. More than that, labor leaders have feared that legislative arbitration, if long continued, may involve a fundamental threat to independent unionism. They have wondered whether in a far-flung system of compulsory determinations by the state the unions can survive as autonomous economic forces or whether they will degenerate into organs of the state and their leaders become mere recognized pleaders before official tribunals. In-

deed, sometimes union leaders have gone farther in their fears and have asked whether a binding determination by the government as to an employee's appropriate working conditions may not approximate the involuntary servitude outlawed by the Thirteenth Amendment to the United States Constitution.

Business interests have been equally hostile to quasi-legislative arbitration. They correctly perceived that this process will often take from them the right to a controlling, or sometimes even an equal, voice in the making of labor policy in their own plants. In some cases it may take from them the option of temporarily shutting down their business, and instead may leave only the choice of compliance or governmental sequestration. And even where the process does not go to such extremes, compulsory arbitration tends to involve a guarantee to workers without corresponding guarantees to stockholders or managers.

Have these differing, but deep-seated, objections to quasi-legislative arbitration been in any way altered in the present crisis?

I think it is fair to say that until now there has been no public change in position. Newspaper editors, politicians, labor leaders, business executives, all continue to proclaim to their varying constituencies their unyielding opposition to compulsory arbitration. But I venture to believe that these proclamations are deceptive. They hide a drift toward quasi-legislative arbitration which has set in on every side.

Labor leaders showed in their conference with representatives of business concluded on December 23, 1941, at the Federal Reserve Building in Washington that they recognized that in wartime there should not be strikes. As realists, they knew that most of their members would not want to quit work in a crisis and that in any case the public would not long tolerate strikes as usual. Having agreed to outlaw strikes, union officials have sufficiently long heads to appreciate that if collective bargaining fails, if mediation breaks down, their only remaining resort is compulsory arbitration. Having disarmed themselves, the unions now expect the government to take a strong hand to protect employees.

Business men perhaps have not seen so clearly that with the outlawing of strikes, compulsory arbitration is inevitable. But those who have watched governmental restriction of their

prices, of the priority of their supplies, and of their right to continue manufacture of their usual products in their own way have asked when government will regulate labor. Sometimes these business interests speak in terms of wage control, sometimes of union discipline, sometimes of registration and accounting. Remembering the government's recent seizures of an airplane factory, a shipyard, and a parts plant, they complain that the government has not taken equally stern measures respecting employees and unions. However phrased, the trend of employers is to invite the government, at least for the duration of the war, to establish standard conditions for workers.

Moreover, the disinterested public looks quite differently today than it did before upon an increase of governmental power over labor relations. When men are conscripted for military service the layman is not shocked to have the government set the terms upon which workmen shall build airplanes, tanks, guns, and battleships. The danger of individual hardship seems momentarily less important than the danger that national production may be interrupted or delayed by lack of machinery to settle any type of dispute whatsoever. The word *liberty* has come to mean first and foremost our right as a country to govern ourselves, not our right as individuals to escape the restrictions of government. Indeed, this sentiment prevails throughout the democracies. The English and the Canadians, who love liberty no less than we, have come to the conclusion that their major disputes, if not otherwise adjusted, must go to compulsory arbitration. And I believe we shall do likewise. Of course, we may not be frank enough to use the obnoxious phrase *compulsory arbitration*. A nice regard for semantic prejudices and a skillful use of legal fictions may lead draftsmen to speak of Labor Boards instead of Arbitration Boards. We shall thus illustrate Morris Cohen's dictum that "The law must grow by assimilating new situations to the old and in moments of innovation we cling all the more to old linguistic forms."<sup>2</sup>

But though, in my judgment, we should be prepared for quasi-legislative arbitration as a last resort, I do not suppose that this will be or should be the usual process for adjusting labor disputes. In the future, as in the past, most differences can be settled by collective bargaining with no outsiders

<sup>2</sup> Morris Cohen, Article on "Fictions," *Encyclopedia of the Social Sciences*, vol. VI, pp. 225, 228.

present; or if that fails, by collective bargaining in the presence of official conciliators or strictly mediation boards. The very existence of an arbitration tribunal might indeed promote rather than hamper settlements by collective bargaining. Unless the arbitration tribunal has acquired such a partisan reputation as to lead one group always to hope for its intervention, most employers and most employees will continue to prefer to make their own settlements rather than to gamble on outside umpires.

#### A DECLARATION OF LABOR POLICIES

A second problem is whether an arbitration agency should decide each case on its merits or should be governed by an announced set of substantive policies.

In considering this issue I deliberately lay aside for the moment a related question of who would formulate any such set of policies—whether it would be the arbitration agency itself, or other organs of the executive branch of the government, or Congress, or a special conference representing labor, management, and the public. My present inquiry is only whether there should be any advance declaration of principles.

Sometimes the subject is treated as though it involved only two types of issues—union security and wages. I shall have something separate to say on each of those two issues, but I regard it as a fundamental error to assume that in labor controversies they are the only topics on which it is theoretically possible to have a declaration of policy.

Without attempting to exhaust the list, the following (in addition to union-security and minimum-wage issues) could be considered as proper questions to be solved by a declaration of labor policy:

1. Shall the percentage rate of pay for overtime work be made uniform, and if so what shall be the rate and after what hour in the week shall it begin, and on what days shall it be paid?
2. Shall there be a vacation policy during the war?
3. What shall be the conditions under which women replace men at jobs?
4. Shall there be recognized procedures to encourage the simplification of labor tasks in order to permit the greater use of unskilled labor?

5. Shall there be recognized procedures to encourage the introduction of incentive systems, and what guarantees shall there be to assure labor participation in judging the fairness of the system?
6. Shall the government require the insertion in every collective bargaining contract of some provision (a) for grievance machinery, (b) for arbitration of all disputes regarding interpretation of and performance under the contract, and (c) for giving the government notice if negotiations for a renewal of the contract fail so that the government may make arrangements for conciliation, mediation, or arbitration?
7. Shall all matters falling within the jurisdiction of statutory administrative agencies be automatically referred to those agencies, and if so, shall the parties be asked to accept as final without court review the determination of those agencies?
8. Shall collective contracts be treated as binding agreements which shall not be opened except according to their terms or except by mutual agreement?
9. Shall it be a requisite to a hearing before an arbitration board that production shall continue during the hearings?
10. Shall all arbitration awards be made retroactive under uniform rules?
11. Shall all arbitration awards be accompanied by statements of findings and of reasons?
12. Shall arbitration awards, so far as appropriate, specify the period during which they are to be in effect, the methods for clarifying questions of interpretation, and the means for enforcement?
13. Shall the national labor organizations be encouraged to provide their own tribunals for the authoritative and binding settlement of jurisdictional disputes during the war?
14. Shall provisions be developed for the protection of the seniority rights of workers who, in response to war needs, move from one plant to another?
15. Where a condition favorable to labor is changed at the government's request or order to meet the special needs of war production shall each change be recorded with the understanding that the union reserves the right at the end of the war to have the prior condition restored?

On the issue of whether or not to have a declaration of principles of the general type just outlined we get less illumination from history than is sometimes supposed.

The Taft-Walsh National War Labor Board is usually spoken of as an arbitration agency which applied a set of principles previously adopted by a conference of representatives of labor and management. This is an overstatement. The principles adopted did outlaw employer discrimination against union employees, did promise equal pay for equal work by men and women, and did freeze the existing status of open and closed shops. But the ambiguous guarantee of a living wage furnished no workable guide for wage controversies, which were the staple of that Board's business, and only the most vague generalities were offered on the details of ordinary subjects of a collective bargain, with the one exception of the open shop-closed shop issue already mentioned.

The National Defense Mediation Board purported to decide each case on its individual merits; but that doctrine was never acquiesced in by all the members of the Board, and a careful study of the records of the Board shows that some persons did, despite the Board's contrary public statements, try to establish and adhere to policies and precedents.

So far, the English have not accepted any over-all policy on controversial labor issues. Although the government put out last summer a White Paper on a suggested wage policy, it has not been able to secure the trade-union support which is a necessary condition precedent to adoption of the policy. And not only wage but also union-security cases are decided on an *ad hoc* basis. In at least one case, despite the contrary gossip as to English practice which we hear in smoking cars in this country, an agency, acting under the Industrial Courts Act, after examining the special facts in the coke industry in Durham County, made an award that for the duration of the war membership in the National Union of Cokemen and By-Products Workers should be a term of employment of all the workers employed by Brancepeth Gas & Coke (Strakers & Love) Ltd.<sup>3</sup>

History being of so little avail, we may turn to other considerations. The argument for the declaration of principles comes most forcefully from industrial leaders, the conservative

<sup>3</sup> British Ministry of Labor Gazette, October, 1941, p. 205.

press, and lawyers. They contend that the mere statement by the government of a policy which it is prepared to support will lessen disputes. They say that many disputes would never arise if the rules were announced in advance and publicized and that other disputes could be quickly settled by informal reference to the rules. This, they urge, is the way people are accustomed to act in relation to disputes about property or the other usual types of legal interests. Most persons rarely find it necessary to resort to self-help or to litigation, because the relative rights of the parties are in most cases clearly established and would be agreed upon by informed persons. Moreover, those who favor a declaration of policies say that labor itself has recognized the desirability of clear principles as a method of achieving labor peace. When a labor leader asks for a collective-bargaining contract he is in effect saying that there will be more certainty and security and less risk of arbitrary discrimination if the rules in a particular factory are formalized at the outset. And business when it asks the government for rules is seeking for itself the same sort of certainty, security, and freedom from arbitrary discrimination. Furthermore, those who seek a declaration of rules note that in its absence the tendency is to seek peace in a particular controversy by wringing a concession from the party that happens to be weakest in that particular situation, without regard to either justice or the effect of the decision in causing unrest and inequities in other situations not then under review.

Against a declaration of policies stand the majority of labor leaders. Although they do not say so publicly, perhaps the basic reason for their hostility is that labor is always seeking to improve rather than to stabilize its position. Since any statement of rules implies at least temporary limitations, it is repugnant to their progressive philosophy. Moreover, progressive movements usually move forward not by simultaneously improving the standard in all parallel situations, but by working first on one salient and then on another. And these zig-zag tactics are particularly favored by labor leaders, not so much because of doctrinaire motives, as because of their temperament, training, and fields of opportunity. They are experts in trading, in dramatic presentation, in *ad hominem* argument, and in the subtleties of political adjustment. They understand much better than most of us how to handle men, whether they wear overalls or the trappings of office. And they have no

desire to subordinate that great skill to the less colorful art of juggling words, rules, and precedents.

For somewhat different reasons, a substantial number of disinterested persons specializing in labor relations also oppose a declaration of detailed labor rules. They believe that we entered, first the emergency and then the war, when as a country we were in the adolescent period of labor relations. They fear that the announcement now of a fixed policy not only would stunt normal growth but in fact could not be carried through because of lack of sufficient experience with collective bargaining and with labor regulation. They refer to the lack on the sides of both management and labor of the disciplined organizations requisite for implementation of any program. And they ask whether we should not sacrifice our main goal of maximum war production if, without public debate and without overwhelming public support, we adopted a program strongly opposed by organized labor or by management.

Having summarized the issue, I venture, not to resolve it, but to make a prophecy. I regret to say that I think that at the present time there is no reasonable likelihood of a broad declaration of labor policy. The recent conference of representatives of management and labor in Washington showed that the leaders of the interested groups are so far apart in their thinking on fundamental issues that, left to themselves, they cannot unite on a program. Those who are in power in the Administration do not believe that the enunciation of principles by them, without support from the representative groups, would serve any useful purpose. Unless they are otherwise directed by the President or Congress, I, therefore, do not expect to see any announced set of substantive policies to guide the labor-arbitration agencies.

#### THE ISSUE OF UNION SECURITY

The discussion of whether there should or should not be a labor policy formulated to govern an arbitration agency almost always leads to a debate on what is called by labor the issue of union security and what is called by management the closed-shop issue. To avoid confusion I shall begin the discussion of this topic by defining some terms as I shall use them, but in doing so I recognize that others might use the terms differently.

In a closed shop the employer agrees that all persons must be

members of the union before they are hired and must remain union members in good standing as a condition of continued employment.

In a union shop the employer is free to hire whom he pleases. But all who are employed must, after a probationary period, become and remain union members in good standing as a condition of continued employment.

In a shop where a maintenance-of-membership clause governs, the employer is free to hire whom he pleases. Employees who have not joined a union are not required to join, whether they were employed before or after the clause went into effect. But all employees who were members at the time the contract was executed or who subsequently become members are required to remain members in good standing as a condition of continued employment.

In a preferential shop the employer agrees in respect to hiring new employees or laying off old employees to give preference to union members. The degree of preference varies according to the contract.

In an open shop the employer hires, lays off, and retains employees without regard to their membership or lack of membership in any union.

It is at once evident that there are sharp technical differences which separate the different grades of closed shop, union shop, maintenance-of-membership, and preferential shop. But it is part of the semantics of labor relations to gloss over the differences. The employers, knowing full well the emotional reactions to the phrases open and closed, tend to talk of any kind of provision which makes employment conditioned upon union membership as a closed-shop provision. And with no sinister purpose, this usage has been recently repeated by the President and even, strangely enough, the *Monthly Labor Review*, a publication of the Bureau of Labor Statistics of the Department of Labor. On the other hand, the labor leaders are equally skillful in resorting to a blanket term intended to conceal distinctions and to invite sympathetic emotional response. Remembering the pleasant connotations of social and economic security, they have used the phrase "union security" as an all-inclusive description of differing types of provisions making employees remain union members. And, indeed, in a recent notorious case one of the outstanding labor leaders even went farther in mis-

branding and described a struggle over the "union shop" as a struggle for "union recognition."

However inaccurate they are in their terminology, the parties have usually no confusion as to their purposes. Almost every labor organization seeks at least the union shop, making union membership a condition of employment. A.F. of L. unions often ask for a closed shop, but the C.I.O. unions rarely go beyond the union shop, perhaps because as yet they have not a large roster of unemployed members, perhaps because their unions are not composed chiefly of skilled craftsmen. On the other hand, few employers who operate large establishments welcome any form of union security or union preference.

Without trying to cover the details, it may be useful to summarize the reasons for these positions, as they are generally presented.

The typical labor leader says that the union member has a right to refuse to work with a non-union member. He argues that a collective bargain is a benefit to all who work under its terms, and all should bear the burden of paying for its cost. He says that a union cannot effectively carry through the covenants of its collective bargain unless it has the right to discipline all the persons covered by its covenants. And he urges that it is only when the employer shows a willingness to have a union-security provision that the union feels certain that the employer accepts collective bargaining as a permanent characteristic of his enterprise and the union is free to devote itself to coöperating with instead of struggling against the employer.

The typical employer says that his interest is only in seeing that his employees are good workers. He is concerned with their hours, wages, and working conditions; but he is not concerned with what organizations they belong to. He intends to leave each employee free to do as he sees fit. He is not going to intermeddle with them or their associations. He wants the freedom to hire and fire employees solely on the basis of ability, regardless of their affiliations. He fears that if he takes any other position he will not merely deny employees their just right to determine their own affairs, but he will place the union in a position where it can dictate how he will run his business.

The question often asked is whether those reasons are sincere, or whether they serve as a cloak for ulterior objectives of union leaders and business men. One answer perhaps is that

the reasons have been so often repeated that by now they are sincerely held, whether or not they were originally. But, granting the sincerity of the statements, they perhaps do not tell the whole story. One does not need to subscribe to a universal economic interpretation of history to perceive that behind the battle of phrases there is a fundamental struggle in our economy. Unions want more power and a larger share in determining the conditions of employment, while managers believe that the proposed changes will adversely affect their position, their shareholders' profits, and the volume of production.

There is a substantial body of public opinion which takes the view that since the struggle is fundamental it ought to be laid aside for the period of the war. Those who take this view refer to the last war, when in joint conference representatives of labor and management agreed that the War Labor Board should adopt as a principle that it would not make an arbitral award which changed the *status quo*. They tend to overlook the fact that this principle was adopted as part of a trade in which the employers for the first time agreed not to discriminate against an employee because of his union membership—a principle which was not then, but is now, written into law.

The National Defense Mediation Board, which is about to pass out of existence, did not have the benefit of any agreement such as existed in 1917. Therefore, it had to determine for itself what attitude to take on this thorny question. It was agreed on all sides that so far as the Board engaged in mediation it was proper for it to allow, and even to persuade, parties voluntarily to agree on the open shop or the closed shop, or the union shop, or any type of union security. But the question on which public opinion, and indeed the Board itself, divided was whether, in a case where the parties disagreed, the Board should use its governmental authority to make any recommendations on this type of issue.

The Board, or divisions of the Board, did recommend the closed shop in one case and maintenance of membership in several cases.

The closed-shop case was perhaps unique, since it involved the case of a single employer, the Bethlehem Shipbuilding Corporation, which had theretofore refused to sign a uniform closed-shop contract that had been accepted by every other employer in the Pacific shipbuilding industry. In deciding in

favor of a closed-shop recommendation the Board purported to establish no precedent as to closed shops, but merely to decide that where a practice had become all but universal in a given industry in a given area that practice should be adopted by the single enterprise that had not previously adopted it.

The maintenance-of-membership provision was recommended in seven out of the more than 100 cases heard by the Board. Of these seven, perhaps the three best known involved the North American Aviation Company, the Western Cartridge Company, and the Federal Shipbuilding and Drydock Company. The Board, either in the text of its recommendations in these cases or subsequent statements to the press, attempted to justify its conclusions on the special facts of each of these cases. For instance, in the North American case it was thought that the union was entitled to special consideration because the Army's use of troops had damaged the union and it was doubtful whether the national union leadership could without some guarantee of membership reestablish the organization the undermining of which it had permitted in the interest of national defense. In the Western Cartridge case a maintenance-of-membership clause was recommended because the conduct of the company during the proceedings of the Board seemed to justify some prophylactic against union discrimination. In the Federal Shipbuilding case the Board had the view that the union was entitled to protection from the consequences of its acceptance of the government's shipbuilding agreement, which fixed some terms of employment and outlawed strikes for two years.

In candor, it must be admitted that during the summer of 1941, as case followed case, there was a tendency less to emphasize special facts and more to favor the maintenance-of-membership provision as a useful compromise in many cases.

Those who favored the tendency said that the unions, particularly if they gave up the right to strike, were entitled to some symbol that the government and the employers accepted unionism as a desirable and inevitable part of both the war and the postwar economy. They argued that a maintenance-of-membership clause was not morally objectionable. It did not force any employee to join a union. It only went so far as to apply familiar principles of agency; an employee who joined a union authorized the union leader as his agent to make, subject

to ratification by the majority, the usual type of collective-bargaining contract, and among usual types was a maintenance-of-membership contract.

Those who opposed the tendency alleged that the Board was making a fundamental change in public policy. They thought no such change should be made in a crisis; and in any event should be made only by Congress. They thought that the character of the change was greater than the Board appreciated. They said that the restriction on the right of the employee to withdraw from the union and maintain his job often was a serious moral limitation and played into the hands of racketeers, men with political ambitions, and irresponsible union leaders. They argued that in practice a union-maintenance clause soon brought about a strictly union shop, and that in the intervening period shop discipline was broken and production was adversely affected. Also they argued that the effect of the Board's decisions was to breed disputes because of widespread demands by union leaders for maintenance-of-membership clauses.

The debate was carried on with vigor, particularly after, in the early fall of 1941, the United States Steel Corporation's subsidiary, Federal Shipbuilding and Drydock Company, refused to accept the Board's recommendation of a maintenance-of-membership clause, and, as a result of the strike which followed, lost until the other day the right to run its yard at Kearney.

But the debate reached its climax, not on the question of a maintenance-of-membership clause, but on the demand made by the United Mine Workers for a union-shop clause in the captive mines. I have no intention of reviewing the coal dispute, as to which I have already expressed my views in a separate opinion filed in that case. But I may say this, the problem there was complicated by special facts: the question at stake was whether a coal miner should be required to join a union which on its record had shown irresponsibility by calling strikes in a great emergency; which had collected large sums for political purposes and activities having no relation to coal mining; which was prepared to exercise a completely unregulated labor monopoly throughout the whole of the coal industry; and which on the record showed no need to have a union shop to preserve its existence. In denying the union's demand for a union shop, the Board was governed to a large extent by

these special facts. However, it undoubtedly was also affected by other general facts. Further reflection, greater experience, increased strikes, and criticism in the press and on the floor of Congress had made some members of the Board change the views they had entertained at the time the Bethlehem and the Kearney cases were decided. It was not absurd, therefore, for the C.I.O. to charge that the Board had shifted ground and that it was less likely that maintenance-of-membership or union-shop clauses would thereafter be recommended. However, the matter was by no means clear, even to an informed observer, and depended on a careful count of noses and on a subsequent intellectual climate which was unpredictable.

The withdrawal of the C.I.O. members of the Board, the reversal of the Board by the special tribunal created by the President and headed by John Steelman, the bombing of Pearl Harbor, and the Management-Labor conference in Washington in December combined to bring to an end the struggles of the National Defense Mediation Board. But there remains the union-security issue and the problem of how it should be handled, especially in the light of recent experience.

The position of the unions is that each case which does not yield to mediation should go to arbitration to be decided on its merits. The position of the employers is that where mediation fails the *status quo* should be maintained. Outsiders have suggested various compromises. One proposes that the union shop should be awarded when a certain percentage of the employees have joined the union. Another suggests that the union shop should be awarded when the union is willing to accept public registration of its constitution, bylaws, and list of officers; regulation of its conditions of admission and expulsion and of its dues and assessments; and standards for conducting elections. A third invites consideration of an agreement for the war period on a maintenance-of-membership formula with provisions for withdrawal from the union on certain specified conditions. A fourth inquires whether the device of the preferential shop invented by Mr. Justice Brandeis could not be further explored as a *modus vivendi* for the period of the war.

I have not the temerity to have a solution of my own. But I do say this: unless the national organizations of employers and employees agree upon, or Congress prescribes, a policy upon this issue, an executive board which tries unaided to deal with

the issue will not last long. It will eventually meet defiance from an employer as strong as United States Steel or a union leader as strong as John Lewis, and that defiance will gain strength because the Board cannot point to the breach of an established rule.

#### WAGE POLICY

Next to the question of union security, the labor issue which attracts most public attention is the wage issue. The question of wage policy is so complicated that it deserves a lecture of its own and from an economist, not a lawyer. Here I shall not try to go beyond summarizing some of the principal points.

In the last war, and so far in this war, neither England nor the United States has had a wage policy. Canada has by government decree frozen wages, but has made provision for increases where there were substandard conditions or where the cost of living advances by a sizeable percentage.

The record of the National Defense Mediation Board shows an almost unbroken set of wage increases. For this there were certain special causes. One of the most important was that on the morrow of the Board's creation, Ernest Weir of the National Steel Corporation raised basic wage rates 10 cents an hour, and this pace was followed elsewhere in steel. Shortages of labor accounted to some extent for further increases. But more important psychologically were the stream of corporate reports reflecting enhanced earnings for business, the anticipated increases in living costs, and the frequent news reports of wage increases throughout the country. In such an atmosphere it was of little avail to refer to lean years in the past, to future taxes, to the as yet moderate increases in cost of living figures, or to the increased working hours and consequent higher weekly earnings.

But, no doubt, there were also general causes which always exist to promote wage increases when a mediation or arbitration agency has no declaration of wage policy to guide it. The labor representative can always stress the human side of the picture and press home that dramatic appeal. This is likely to be particularly effective if the public members are not economists learned in the technicalities of wage problems and if the employer members are not familiar with the particular trade. Under such circumstances, through ignorance of the wage

issues, the public and employer members are likely to concentrate on simpler and more standardized issues, such as union security, and to seek to prevent a settlement adverse to their views on those issues by promoting concessions to labor on the wage issue. Moreover, there are few people who see as plainly the repercussions not only in a particular industry but in the nation as a whole of a wage determination as they do of other determinations. They are, therefore, more easily led to compromises. The only way in which the National Defense Mediation Board effectively met this tendency to compromise was by the appointment of Special Investigators who made reports for the guidance of the Board. These reports were effective in the ordinary run of cases, but were resorted to in few of the cases that attracted nationwide publicity. In those cases the Board generally undertook to make determinations without the aid of Special Investigators.

There is considerable doubt whether the board which succeeds the National Defense Mediation Board will improve on its predecessor. No agreement on wage policy has been reached, and the official economists of the government show no tendency to advocate a wage policy. They talk as though putting a ceiling on prices would limit profits and therefore wages. They do not tell us what is a fair rate of profit; whether profit is to be determined by industries or companies; and whether labor-arbitration boards are now to be set to the Herculean tasks that have baffled so many public-utility commissions. They talk of the administrative difficulty of fixing wages, but do not compare it with the task of fixing prices, which the government is willing to undertake, or show us that the Canadian experiment has failed. They talk as though increases in wage rates were necessary to maintain worker morale and to promote necessary mobility in wartime, but they place less stress on the extent to which wage increases adversely affect soldier morale, overload an already heavy government budget, increase the cost of living, and magnify postwar problems.

Since I am not an economist I shall not attempt to go farther into the substance of the debate on the wage issue. But as a lawyer I do feel free to say something of the procedure which might be followed in wage questions.

Arbitration boards usually follow the Solomonic practice of offering to divide the baby in halves. But even where there

are no complete substantive rules, this is not a necessary method. An agency which has not a policy on wages could at least have a technique, and perhaps the National Defense Mediation Board was working toward a technique. In every case the agency might make it a practice to make express findings on these points: what in the last decade have been in the industry, and in the plant in controversy, both the hourly wage rates and the weekly earnings; when were the last advances made and how much were they; what have been the local changes in the cost of living; how profitable is the industry as a whole; and what unusual financial advantages or disadvantages exist for the workers in that enterprise.

These are surely elementary safeguards. Yet familiarity with the briefs of contending parties and with arbitration awards will show that they are rarely stated clearly and concisely. I am not unaware that this defect is not solely procedural. Like other questions of "relevancy," it partakes of what lawyers call substantive law. Or, as the philosophers would tell us, the selection of logical categories itself determines the conclusion. Perhaps it is because I recognize the truth of these comments that it seems to me important to establish patterns for wage determination. If an outright declaration of wage policy is not politically, administratively, or economically practical, it is at least feasible to have declared techniques which may accomplish indirectly some of the results desired by advocates and even critics of a wage policy.

#### THE COMBINATION IN ONE TRIBUNAL OF ARBITRATION AND MEDIATION

Another question is whether the same agency should engage in both labor arbitration and labor mediation.

In discussing this issue it is of importance to distinguish between quasi-judicial arbitration and quasi-legislative arbitration. If a rule has already been prescribed by contract, by custom, by statute, by a conference of representatives of management and labor, or by a governmental declaration of policy, the arbitration board performs a quasi-judicial task. This calls for quite different talents, habits, and skills than those of a conciliator or mediator. It usually justifies formal procedures, logical techniques, documented conclusions. The tribunal must

focus on the precise ascertainment of facts, not on a rough compromise of differences. And it may be proper to invoke precedents and to note resemblances to and distinctions from other cases. Above all, the arbitrator must eschew the maxim of Thrasymachus that "Justice is the interest of the stronger."<sup>4</sup>

That this is the sound policy where quasi-judicial proceedings are involved is clear from the whole history of our courts and our administrative agencies. Indeed, mindful of this principle, the National Labor Relations Act expressly prohibits the National Labor Relations Board, a quasi-judicial agency, from engaging in conciliation. And a like segregation characterized the Taft-Walsh Board.

But it is sometimes alleged that a melange of mediation and arbitration is quite proper where the arbitration is quasi-legislative in character, that is, where the duty of the tribunal is not to apply an existing rule of law or declaration of policy, but to prescribe a new rule.

The argument for combining mediation with quasi-legislative arbitration is threefold:

First, it is said that even if a tribunal is empowered to act in a quasi-legislative capacity it should do everything possible to avoid exercising its power to make awards and instead should, until the last moment, try by persuasion to promote agreements. This point of view rests partly on the ground that the parties know more than the neutrals about the appropriate remedies,—or, as the Spanish proverb puts it, "a fool knows more at home than a wise man at his neighbor's." It also rests partly on the ground that if the solution is achieved by mutual assent instead of by imposition it is often taken with better grace and more scrupulously observed.

Second, it is said that the prescription of a new rule cannot be determined by strictly scientific or logical criteria and a formal procedure which emphasizes legal rules is inappropriate. Successful rule making is alleged to be largely pragmatic. In trying to make a shrewd estimate of what rule will be workable, an agency, it is contended, will get more reliable clues from the unstilted conversation and rough impressions of those who are to be regulated than from the formal testimony of lay and expert witnesses. In short, the business of a mediation session is

<sup>4</sup> Plato, *The Republic*, Book I, p. 339.

thought to be the thoroughly admirable equivalent of the legislative cloakroom.

Third, it is said that in quasi-legislative arbitration the agency is performing, in the best sense of the term, a political function and therefore should seek some sort of compromise. We are reminded of the dictum of John Morley's that "politics is the art of the second best" and we are told that that Delphic utterance emphasizes that the successful search for substitutes is the means for achieving durable determinations of broad policy. All this is expected to lead us to the conclusion that for the legislative type of arbitration the mediator is ideal. He is thought to have the desired temperament. More than that, his mediating experience on the same cases is thought to give him special qualifications: his intimate contact has made him familiar with the concealed economic and psychological stresses to which the parties are subject; and he knows as well as any stranger can what compromises will work, and better than any stranger what compromises will *not* work.

To these arguments several answers are offered:

If an arbitration agency engages in mediation it is liable to create in the parties an uneasy feeling that its chief interest is not in being fair, but in being canny. Officials may breed a suspicion that considerations which are not openly disclosed play too large a part in the decision.

Again, it is said that the analogue of a wage-arbitration board is not a legislative body but a rate-making body, like a public utility commission or a statutory wage board, and it is noted that the Supreme Court of the United States has ruled that it violates the procedural due process guaranteed by the Bill of Rights of the Constitution for a rate-making body to base its rates on matters in its files not brought out publicly at open hearings. Although these court decisions may not control wage boards as a matter of law, it is suggested that they show the undesirability of too great informality in labor arbitration.

Finally, it is observed that the point that because quasi-legislative arbitration is "political" in character it must follow that compromise is always proper, is by no means self-evident. To some persons political, like other, decisions should be based on principle. They resent the view that legislative arbitration is a black art successfully practiced only by unprincipled persons working in dark corners.

## THE COMPOSITION OF AN ARBITRATION BOARD

Another problem is whether the agency set up to handle labor disputes should be composed entirely of neutral public officials or should be tripartite, with representatives of employers, employees, and the public.

We have had experience with an all-public and with tripartite agencies. The National Labor Relations Board and the boards functioning under the Railway Labor Act have only public members. On the other hand, a tripartite constitution existed in the Taft-Walsh National War Labor Board, the NRA National Labor Board headed by Senator Wagner, the National Defense Mediation Board, and in the English Boards established under their National Arbitration order.

There are certain undeniable advantages which flow from a tripartite arrangement. Both labor and management feel that they are playing a larger part in the war effort. Their presence on the tribunal prevents egregious blunders such as might follow from a personnel drawn from complete outsiders. With the participation of industrialists and labor leaders the chance of the agency falling into the hands of anonymous bureaucrats or young, untrained staff members is lessened. Parties who come before the board often feel that they have a friend in court, and this makes them not only more amenable during the proceedings, but, if the decision is adverse, may make them more reconciled to the result. Moreover, in all but a few cases it is surprising how much unanimity can be achieved in a tripartite board. In the National Defense Mediation Board, for example, there were dissents in only four cases.

But there is another side to the picture.

Those who are named to represent labor and management often regard themselves as partisans. Even when they are persuaded that a particular result is just they may be unwilling openly to say so, but will favor a formula which avoids a flat declaration. On major issues of policy they may feel less impressed than they should with the public interest and more with their partisan views.

Labor and management representatives are apt to be irregular in their attendance, and, even when present, they tend to depart from the formality which may be appropriate. This irregularity, plus the partisan spirit already referred to, often

puts a much larger task upon the neutral chairman than he would have if he were sitting only with other neutrals and with the parties themselves; indeed, at worst, he may find himself engaged in mediation with his colleagues as well as with the parties.

Then there are more fundamental objections which tend actually to weight the scales in favor of labor. The labor representatives are more conscious of their identity with the labor litigant than the management representatives are conscious of their identity with the employer litigant. The labor representatives also ordinarily are more skillful than the employer representatives in the arts which prevail in an arbitration tribunal: they know the terms better, they talk better on their feet or around the conference table, they know more of parliamentary and statutory law, frequently they have greater experience and wider contacts in the government. Also they are likely to have a program, whereas the employer representatives, if they have a program at all, are likely to have a negative one.

In addition to these difficulties, there are others which crop out in particular types of cases. When a union unaffiliated with one of the two great national labor organizations has a case it is less likely to be satisfied with a tripartite than with an all-public board. When a case involves a union that has an officer on the board, even if that officer technically disqualifies himself, an employer is less likely to be satisfied with a tripartite board. And when there is at stake in a controversy a matter which has excited public controversy before it reached the tribunal, it is rare that the group representatives and their organizations have avoided embarrassing commitments.

#### EPILOGUE

There is one further word that I think may be said. It has become somewhat the fashion to assume that labor controversies, indeed, that all economic controversies, have naught to do with justice but are at bottom mere struggles for power. And this view is reënforced by the chaos which so frequently characterizes labor proceedings and by the passionate invective occasionally turned against the tribunal as well as the parties. Yet to me it seems that the task of a labor arbitrator can be performed not only with dignity and understanding but with

justice. Over the doorposts and lintels of labor tribunals, I should hope to see written, as though it were a Hippocratic Oath, the boast of the Greek lawgiver, Solon:

I gave the commons their sufficient meed  
Of strength, nor let them lack, nor yet exceed.  
Those who were mighty and magnificent,  
I bade them have their due and be content.  
My strong shield guarded both sides equally  
And gave to neither unjust victory.<sup>6</sup>

<sup>6</sup> Gilbert Highet's translation of Solon, "The Lawgiver's Boast," *The Oxford Book of Greek Verse*, No. 159. Reprinted by permission of the publishers.



### **PART III**

### **SOME PROBLEMS OF WAR FINANCE AND GOVERNMENT**

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## THE ROLE OF STATISTICAL FORECASTS IN PLANNING FOR DEFENSE

*James Tobin*

HOWEVER opinions may differ on the virtues of a planned economy in peacetime, no one doubts that a large degree of economic planning is necessitated by industrial mobilization for war. In such a period the economic capital of the United States must indisputably be Washington, and the major decisions of business policy must be made by the authorities entrusted with the direction of the industrial mobilization. These authorities will do a better or worse job of planning, depending on the adequacy of the knowledge and the reasonableness of the predictions which they use as the basis for deciding and executing their policies. Obviously one type of knowledge which such a planning board must have is a schedule of the industrial requirements of the armed forces, the amounts of various commodities they will need at specified dates. Without such a schedule, or an approximation to such a schedule, it is clearly impossible to plan production so as to be sure of meeting army and navy requirements. The adequacy of this type of needed information depends wholly on the ability and willingness of the armed forces to devise and to follow a time schedule of their requirements.

But this is not the only type of information which the Washington planners must have. They must be able to make reasonable estimates of the effects of the defense program, once it is known, on the civilian economy. They must make some guesses, for example, as to what the incomes of consumers are likely to be, and they must predict the amounts of various goods civilian consumers will demand. Only on the basis of these guesses can the authorities make such decisions as the following: In what industries should production capacity be expanded, and by how much? In what sectors of the economy will priorities or rationing have to be instituted, and where they are instituted, should they last for the duration of the emergency or merely until new capacity is ready? If priorities are instituted, what consumers other than the armed forces themselves should be given prior-

ity? Moreover, the fiscal and monetary authorities will have to judge the economic effects of the defense program in order to decide upon the appropriate tax and monetary policies and to know when to apply them, for they must know when to expect the monetary demand for commodities to outrun the possibilities of expanding production, that is, when to fear inflation. These examples should make clear how vital estimates of this type are for the making and execution of policies by the defense administration.

In the last war, both the military and economic estimates of the planners were inadequate; as a result, the industrial mobilization was not so effective as it might have been and civilian consumption was unnecessarily restricted. The question arises, therefore, whether the present administration can be adequately equipped with data on which to base decisions. Whether it can be informed concerning military and naval requirements depends on the army and the navy. But whether it can make reasonable guesses concerning the economic repercussions of the defense program is a question on which economics ought to have something to say. The purpose of this paper is to show some of the contributions which economic and statistical analysis may be able to make.<sup>1</sup>

There are, no doubt, many methods by which a prediction concerning a certain economic variable, say the demand for steel for civilian consumption, might be made. For example,

<sup>1</sup> This paper was written at Harvard University in the early months of 1941. The type of analysis employed has been widely used in statistical-economic literature; for example, M. Kalecki, *Essays in the Theory of Economic Fluctuations* (London: G. Allen and Unwin, 1939); Gardiner Means, *Patterns of Resource Use*, a report by the Industrial Committee to the Natural Resources Committee (Washington: Government Printing Office, 1939); J. Tinbergen, *Statistical Testing of Business Cycle Theories* (Geneva: League of Nations Economic Intelligence Service, 1939).

The application of this type of analysis to the present subjects has been developed in the research divisions of government agencies: Board of Governors of the Federal Reserve System, Department of Commerce, National Defense Advisory Commission, Office of Production Management, Office of Price Administration and Civilian Supply, and others. None of this work has been published. It is impossible to call attention to all the individuals who have had a part in this work. In particular, mention should be made of the contributions of Lauchlin Currie at the Federal Reserve Board; of Richard V. Gilbert, formerly in the Industrial Economics Division of the Department of Commerce and now in the Defense Economics Section of the Office of Price Administration; and of V. Lewis Bassie, who has worked on this subject at the Federal Reserve Board, the Industrial Economics Division of the Department of Commerce, the Civilian Requirements Division of the National Defense Advisory Commission and later of the Office of Production Management, and now the Supply and Requirements Section of the Division of Civilian Supply of OPM.

it might be made by asking all the consumers of steel how much they expected to need. Or if, by chance, the demand for steel had been observed in the past to vary closely with some other variable, say the marriage rate, one might estimate the demand for steel if he had some idea what the marriage rate was going to be. Obviously neither of these methods is very satisfactory; but what are the earmarks of a satisfactory method? In the first place, it ought to be based on past experience. There is no ground for expecting a given prediction to be realized in the future unless the relationships on which it depends have actually held for some time in the past. In the second place, the method of prediction must depend either upon the present values of some variables or upon factors whose future values one can hope to know within reasonably narrow limits. It is no use to know that steel consumption varies as the marriage rate varies, if there is no way of knowing what the marriage rate is going to be. Thus there are many relationships which may have held consistently in the past which are useless for the purpose of prediction, because not even a fairly accurate assumption concerning the values of the independent variables can be made. Thirdly, the method of prediction must make sense from the standpoint of economic theory; otherwise there is no reason to believe that a relationship, however well it has held in the past, will persist in the future. It doesn't make much sense to say that the demand for steel depends on the marriage rate. And even though we had observed a close relationship between these two quantities in the past, we should not have much faith that it would continue unless we could see some mechanism by which the one variable affected the other.

It is common knowledge that the over-all effect of vast expenditures on defense is to increase economic activity—production, employment, and incomes. Evidently the defense expenditures will not increase the national income—the aggregate value of the goods and services produced in the nation in a given year—merely by the amount of the defense orders. For the individuals made better off directly by the defense orders will wish to buy more of all sorts of goods; their increased demands will stimulate expansion of production in other sectors of the economy. These effects will eventually reach in some degree almost every part of the economy, however remote it may be from the defense industries. The national income will

therefore increase by some multiple of the original defense expenditures. At the resulting higher level of national income, consumers and business firms will have increased demands for various goods. The filling of some of these demands may, together with the demands of the defense program, exceed the capacity of certain industries. Or these demands, as a whole, may exceed the capacity of the laboring force of the country, so that there must be a general price rise unless a part of the purchasing power of consumers is somehow drained off the market. These things we may be able to judge provided (1) we can find some way, based on past experience, of relating national income to the volume of governmental expenditure for defense, which we know, and (2) we can find some way, also based on past experience, of relating the aggregate demands of consumers and enterprises for various goods to national income. If we could succeed in finding these two types of relationships, we should have succeeded in making predictions of most of the things we wish to know, simply by knowing the volume of defense expenditures, and we should have a method of prediction which makes economic sense. Unfortunately, it is not possible to achieve this desirable result completely, but we can come fairly close to it.

The problem evidently breaks down into two parts: (1) estimating national income and (2) estimating the civilian demand for a commodity from a known national income. We will consider these two problems in turn.

#### ESTIMATING NATIONAL INCOME

The national income is defined as the total value of the goods produced in the nation in a given year, less the value of goods used up in the productive process. The national income of any year may be divided into two parts: the value of goods consumed, and the value of goods produced but not consumed. The latter part is commonly called investment. Business men naturally expect to receive from consumers an amount of money equal to the value of the consumption goods they have produced. If they receive less, they will curtail their production, and the national income will decrease. If they receive more, they will expand their output, and the national income will increase. Only if their expectations are just satisfied will the

national income be stable. They will be just satisfied when the community consumes out of its income the same amount as the value of the consumption goods produced. To state the same thing in another way, there will be equilibrium only if the community decides to save out of its income the value of the current investment. It is reasonable to believe that the higher its income the more the community will desire to save; it follows that an increase in investment must increase the national income to a point where the public is willing to save an equivalent additional amount. One of the determinants of the level of national income is, therefore, the schedule of the propensity to consume, the function which describes how much the community will consume (and thus by subtraction, how much it will save) at each value of national income.

However, the volume of investment itself cannot be taken as given, since it is in large part determined by the economic process itself. Here it is necessary to distinguish the various elements in investment, to examine the various decisions which determine the value of the goods which are produced but are not destined for consumption.

First, there are the net additions made by business firms to their plant and equipment. Naturally, this does not include expenditure which serves merely to replace plant and equipment consumed in the course of the productive process. The net addition is the total expenditure less the allowances for depreciation of existing plant and equipment. The more prosperous the general business outlook, the more business men feel like taking the risks involved in an expansion of plant and equipment; and business, as a whole, is more prosperous as the national income increases. It is therefore reasonable to expect that the higher national income the greater the net addition of business to its plant and equipment. One of the determinants of the volume of investment will therefore be a function relating business net plant-and-equipment expenditure to national income.

Second, there are the net additions made by business firms to their inventories—their stocks of goods, whether raw materials, half-finished goods, or finished goods. These stocks must be larger to support a larger volume of production, so that it might be expected that a change in national income would cause a change in the same direction in inventories. But the

amount of inventory accumulation depends also on speculative factors which it is very difficult to identify concretely. For example, it depends on the business man's expectations concerning the future course of prices of goods he is accumulating, or on his judgment of the possibility of a future shortage of goods he plans to use in production.

A third component of investment is the total value of housing built by private individuals, either for themselves or to rent to others. Strictly speaking, not only housing but all consumers' durable goods should be included in investment as here defined; and the value of all durable goods, new or old, consumed during the year should be subtracted and included as consumption. In fact, it is impossible to estimate accurately the depreciation of existing durable goods, even of housing. Therefore it is customary to count as consumption the whole of the expenditure on new consumers' durable goods except housing. Housing is obviously an outlet for saving to a degree that no other consumers' durable goods are. It seems, therefore, that we can get the most sensible schedule of propensity to consume by excluding housing expenditure from consumption; decisions to consume when consumption is so defined are most likely to be determined by the level of national income. For the same reason, depreciation of existing houses is not considered; unlike business depreciation, this is not a concept which is likely to guide an individual in making his decisions about consumption and saving. Our third component of investment, therefore, reduces to the volume of new housing built by private individuals. Private individuals surely will feel more like building new houses as their current incomes increase, though the income level is not the only factor determining the volume of new housing. The aggregate income which is a relevant factor in housing decisions is probably not national income itself but consumer income—the total amount of money paid out to private individuals as income. This differs from national income by the amount of the value of their output which business enterprises decide to retain—the addition to their undistributed profits. But this business saving varies systematically with national income, ranging from large negative values in depression years to positive sums in good years. Therefore, as another determinant of the volume of investment, we have the relationship of housing expenditure to national income, by way of consumer income.

The excess of the value of exports over the value of imports is a fourth component of investment, since this excess obviously consists in goods produced in the United States corresponding to which there is no equivalent consumption here. The production of these exports adds to the income of Americans an amount which American business need not receive in payment for its goods, hence it is an offset to saving. From the standpoint of the American economy, one of the determinants of this item of investment is given; for the demand for our exports is determined not by anything in our own economy but by the general level of activity in other countries and by exchange ratios. The volume of imports, however, is determined by the condition of business in this country. When national incomes are low, business firms and consumers will have little need or desire to import foreign goods, while at high levels of income there will be a considerably higher propensity to import. Another determinant of investment is therefore the schedule relating national income to the volume of imports. Given the aggregate value of exports, investment of this type will be less when national income is high. At the present time the volume of exports is in large part determined by the extent of our war aid to other nations.

The final component of investment is the contribution of governments, federal, state, and local, to the aggregate of goods and services produced but not consumed. The total value of goods produced and services rendered to the community by governments can only be estimated as equal to the total expenditures of the governments, and the portion of this total value which is "consumed" is simply the sum of the payments made by the community to the governments. The excess of government expenditures over revenues plays the same role as private investment: it is a contribution to the income of the community which does not need to be received in payment for goods and services currently produced. Like private investment, therefore, it serves as an offset to saving. Now this fifth component of investment is naturally not determined by the considerations which motivate business firms and individuals in making other types of investment. The government contribution is rather the result of political decisions, and an economist must take it as a given factor, just like the volume of exports. In the present case, the contribution of government is very

largely determined by the magnitude of the defense program. (It must be noted that the value of exports which under the "Lend-Lease" program are paid for by our government cannot be counted as investment twice, once as exports and once as government investment.)

Given the volume of the government contribution to investment and the value of exports other than those paid for by the government, and given some way of estimating what the addition to inventories will be, the national income is determined. Corresponding to the value of the "given" components of investment, there is an equilibrium level of national income, at which this amount will be saved, determined by the schedule of propensity to consume. But corresponding to this level of national income there are values for the "induced" components of investment, plant and equipment and housing, given by the functions which relate these types of investment to national income. The value of imports is likewise determined. We now have a new figure for investment, secured by adding to the "given" value the "induced" components and subtracting the value of imports. As before, the schedule of propensity to consume will give us the national income which can be supported by this volume of investment. And so on. Obviously equilibrium will be reached where the national income is such that the community is willing to save the same amount that it is induced to invest plus the "given" components of investment.

To give quantitative content to this schema, it is necessary to find (1) a function relating national income and aggregate consumption, (2) functions relating national income and the "induced" components of investment, (3) a function relating national income and the value of imports. These functions have been found by examining the relationships between these various quantities which seem to have held in the past, in the period 1922-37. Each of these functions will now be considered in turn.

#### *The Relation of Consumption to National Income*

Statistics are available giving the national income in each year of the period 1922-37 and giving the total investment in each year (the sources of these data are given in the notes to the figures). The figures for consumption are obtained simply by

subtracting investment for each year from the corresponding figure for national income. The annual figures for national income and consumption thus obtained are not entirely appropriate for our purpose, for there may be changes in consumption relative to national income due simply to changes in the population; our expected relationship of consumption and income would hold only for a constant population, since it generalizes from the expected behavior of a single income-receiver. Therefore, the figures for each year have been divided by the population of that year and the resulting per capita income multiplied by the average population for the years 1935-1939. Moreover, there may be changes in consumption relative to national income due simply to changes in the prices of consumption goods; we should expect that the income most relevant to an individual's decision to save or consume would be his real income. Therefore the figures for both income and consumption have been divided by an index of the cost of living, so that they represent the values of these two items in dollars having the purchasing power which existed on the average for 1935-39.

It is apparent from examining the adjusted figures that national income has not been the only factor influencing consumption. At the same levels of national income, consumption tends to be greater in more recent years. There seems to be a tendency to increase consumption over a period of time. Moreover, it seems that there is some tendency for the community to stick to its consumption habits of the preceding year. Thus, if consumption were low in one year, it would tend to remain low in the next year, even if there were a high national income. And consumption will be abnormally high relative to national income if the community consumed a great deal in the preceding year. Before we can find the influence of national income on consumption, we must eliminate the influence of these two other factors. In figure 1, consumption is plotted against time and the rising propensity to consume is approximated by drawing a line through points which are similar with respect to the level of national income and the consumption of the previous year. In figure 2, the deviations of the actual values of consumption from the values given by the linear time trend are plotted against the corresponding values of consumption in the previous year. The influence of this factor on consumption is approximated by drawing a line through points to which corre-

## AGGREGATE CONSUMPTION\*

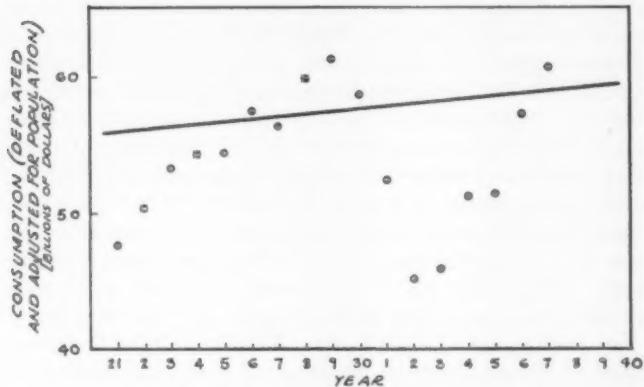


FIG. 1.

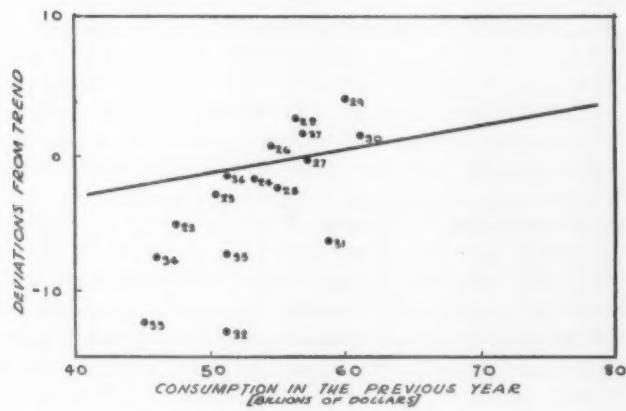


FIG. 2.

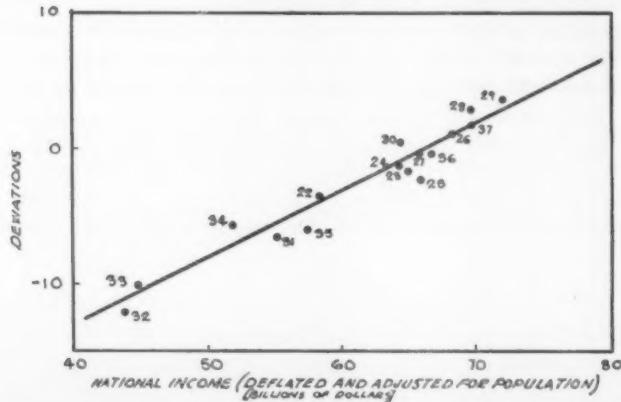


FIG. 3.

\*The figures used for national income and consumer income are those of Kuznets (National Income and Capital Formation) for the years before 1939, and those of the Department of Commerce for the years thereafter. These sets of figures have been adjusted in certain respects to make them consistent.

The figures for investment were secured as follows:

Net addition to plant and equipment, Kuznets.

Private housing expenditure, Kuznets.

Addition to inventories, Kuznets.

Contribution of government, Currie (T.N.E.C.

Hearings on Savings and Investment, p. 4122).

Exports and imports, Department of Commerce.

The estimates of the first three items by Terborgh and Currie (T.N.E.C. Hearings, p. 4122) do not differ widely from those of Kuznets and could just as well have been used.

The population estimates used are the annual midyear estimates of the population, published in the "Statistical Abstract of the United States."

The cost-of-living index used is that of the Bureau of Labor Statistics.

The index of plant-and-equipment costs used is that of Fabricant. (T.N.E.C. Hearings, p. 4038.)

Kuznets' deflation of housing expenditures into constant prices was followed.

Where it was necessary to estimate these two deflators for years for which they were not available, 1938 and following years, they were estimated by assuming that they varied in the same ratio as the Bureau of Labor Statistics index of building-material prices.

spond roughly the same value for national income. Finally, the amounts of the actual values of consumption still left unexplained are plotted in figure 3 against national income; a line is drawn through these points to represent the relationship of consumption and income. This line provides us what we want; given the year, the population, and the consumption of the previous year, we can estimate what values for consumption will correspond to various levels of national income (measuring both in 1935-39 dollars).

#### *The Relation of Net Expenditures for Plant and Equipment to National Income*

We may reasonably expect the net expansion of plant and equipment to vary with real national income, but the money expenditure on additions to plant and equipment will depend also on the costs of plant and equipment. To eliminate this influence, expenditure for plant and equipment is adjusted by an index of costs of plant and equipment, with the average for 1935-39 equal to 100. Comparison of the figures so adjusted shows that less expansion of plant and equipment is induced at a given real national income in more recent years. Therefore, in figure 4 adjusted expenditure for plant and equipment is plotted against time, and the downward trend expressed by drawing a line through points to which correspond the same national income. The deviations of the actual values from this trend line are plotted in figure 5 against national income in 1935-39 dollars, and the line drawn through these points is meant to represent the functional relationship between national income and additions to plant and equipment.

#### *The Problem of Inventories*

Unfortunately, it does not seem possible to find a similar systematic relationship to explain changes in inventories. There seems to be no consistent relationship of changes in inventories either to the level of national income or to changes in national income. Perhaps it would be possible to find a combination of variables on which changes in inventories depend, but this would probably be useless for our purposes of prediction, because it would include variables whose values we could not know in advance. The only expedient is to treat the change in

## NET PLANT AND EQUIPMENT EXPENDITURE

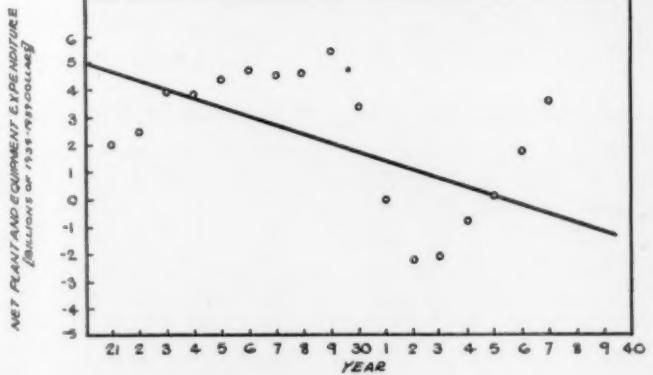


FIG. 4

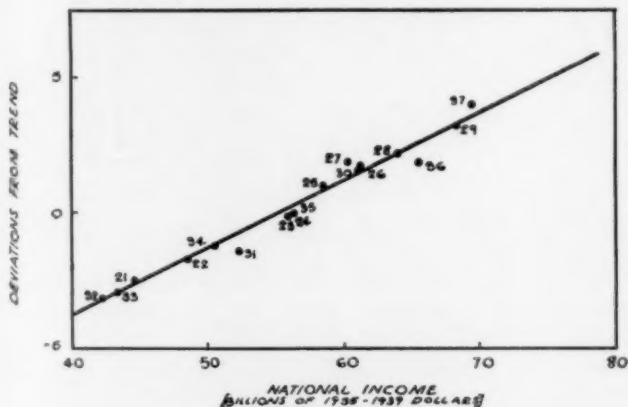


FIG. 5

The figures for equivalent full-time employment are from *Patterns of Resource Use*, published by the National Resources Committee, p. 92.

The figures for consumption of finished steel, both aggregate and broken down into industries, are taken from Volume I of the "T.N.E.C. Papers" of the United States Steel Corporation, pp. 328-9. The set of figures based on *Iron Age* has been used.

inventories as a given component of investment along with the contribution of government. For the purposes of prediction during the present effort, this is not so bad as it might be, since the defense authorities themselves will probably undertake to control the expansion of inventories in order to prevent needed goods from being tied up in stocks. In making our prediction we shall have to make a guess as to how much accumulation of inventories will be permitted.

#### *The Relation of National Income to Private Housing Expenditure*

As stated above, national income may be expected to affect housing expenditure via consumer income. It is first necessary, accordingly, to find the relationship of national income and consumer income, both expressed in 1935-39 dollars. This relationship has been found separately for 1922-29 and for 1930-37.<sup>2</sup> (The difference between the two functions for the two time periods is due mainly to the fact that for the twenties Kuznets' estimates of business saving, the difference between national income and consumer income, were used, and for the thirties the Department of Commerce estimates were used.) Since the volume of new housing constructed might differ solely because of a difference in population, consumer income being unchanged, the figures for both housing expenditure and consumer income were adjusted to a constant (1935-39 av.) population. To eliminate the influence of changes in the cost of housing construction, the housing figures have been divided by an index of construction costs, with the average for 1935-39 equal to 100. A downward trend through time was found for housing expenditure at constant levels of consumer income. The deviations from this trend were plotted against consumer income and a line representing the relationship of housing expenditure to consumer income was found. Both the imperfection of the fit of points to this line and common sense indicate that there are other factors which influence housing expenditure. But it is not within the scope of this paper to attempt a complete explanation of the variations in the demand for housing.

<sup>2</sup> It has been possible to publish only the most important of the correlation diagrams on which the analysis presented in this article is based.

*The Relation of National Income to Imports*

The figures for the value of imports have been converted into constant (1935-39) dollars by dividing by the cost-of-living index. A downward trend in imports was removed by the usual method. Deviations from the trend were plotted against national income (1935-39 dollars) and a line through these points was drawn to represent the relationship between national income and imports.

*The Total Equation*

We now have quantitative expressions for the various functions which we found were necessary to determine the national income. We must be given the year, the population, consumption in the preceding year, and the value of exports, plus the contribution of government, plus the increase in inventories (in 1935-39 dollars). We must also be given the ratio of the index of plant-and-equipment costs to the cost-of-living index, both indexes being computed with the 1935-39 average as a base. A dollar of investment in plant and equipment in some year may be more or less than a dollar of the real income relevant to the propensity-to-consume schedule. For an analogous reason, we must know the ratio of the index of housing-construction costs to the cost-of-living index. Once all these things are known, the national income (in 1935-39 dollars) is determined. It can be computed by the method of approximations described on page 204, or directly by substituting the functions which have been found above in the following expression:

$$\text{National Income} = \text{Consumption} + (\text{Exports} + \text{Government} + \text{Inventories}) + \text{Plant and Equipment} + \text{Housing} - \text{Imports}$$

Since all these functions are linear, this expression will be linear with respect to national income, and the solution to this equation will be the desired value.

In figure 6 the values secured by calculating in this fashion the national income for 1922-38 are shown by the solid line, and the actual values for national income are shown by the double line. For two or three years the calculated values are considerably in error, but the average absolute deviation of calculated values from actual values is \$3.5 billions. The maxi-

## NATIONAL INCOME: ACTUAL AND COMPUTED

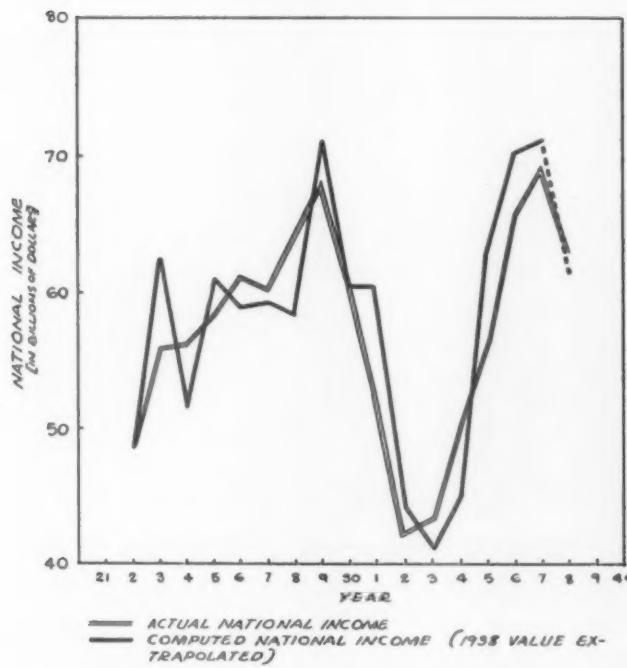


FIG. 6.

The index of Machinery Production is the Federal Reserve Board index.

mum deviation, for 1931, is \$7.9 billions. The year 1938 can be used as a test of the prediction value of the method, since figures for this year were not among the data for which the curves were fit. The calculated value for that year differs from the actual value by less than \$2.0 billions.

#### *Applying the Equation to 1941*

For the purpose of making the estimate for 1941, the increase in population from 1940 to 1941 was assumed to be the same as the annual increase in population in recent years. The ratios of the plant-and-equipment and housing indexes to the cost-of-living index were both assumed to be 110, judging from the present tendency of building costs. The aggregate consumption for 1940 was estimated by comparing retail sales to known values for consumption in previous years. On the basis of these assumptions the two lines in figure 7 were drawn. One, labeled "induced investment," is the sum of expenditures for housing, plant, and equipment (in 1935-39 cost-of-living dollars) which might be expected in 1941 at various levels of national income. The other, labeled "saving + imports," is the amount of saving (income less consumption) and imports, in 1935-39 dollars, which might be expected in 1941 at various values of national income. It is obvious that the expression determining national income may be written

$$\text{Saving} + \text{Imports} = \text{Induced Investment} + \\ (\text{Exports} + \text{Government} + \text{Inventories}).$$

Therefore, the estimate of the national income for 1941 may be read off figure 7 by finding the level for which the assumed value of ( $\text{Exports} + \text{Government} + \text{Inventories}$ ) is equal to the excess of the "saving" line over the other line. Naturally the defense authorities can make a better guess concerning the size of the given components of investment than can be done here; but for purposes of illustration we will make a guess. Judging from the budget message of January 1941, it might be expected that the excess of federal expenditures over receipts, exclusive of aid to Britain, in the calendar year 1941 will be something like \$6.0 billions. In addition, we might expect exports, including aid under the Lend-Lease bill, of some \$4.0 billions. And we might guess that there will be \$2.0 billions expansion of inventories. We must remember, however, that

## NATIONAL INCOME, SAVING, AND INVESTMENT FOR 1941

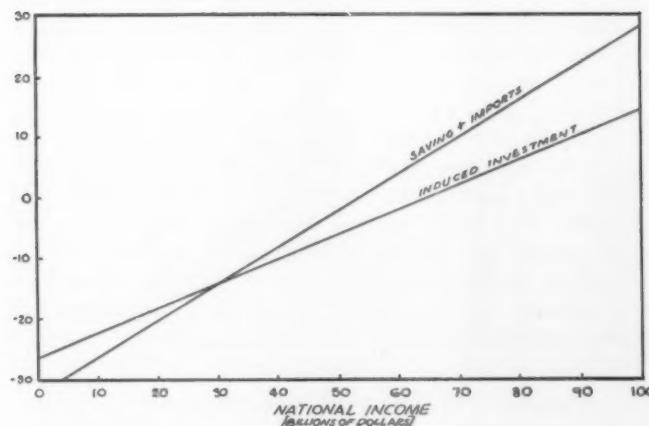


FIG. 7.

THE EQUILIBRIUM VALUE FOR NATIONAL INCOME IS FOUND BY PLACING THE ASSUMED VALUE FOR GOVERNMENT INVESTMENT+EXPORTS+INVENTORIES EQUAL TO THE DIFFERENCE BETWEEN THE TWO CURVES. E.G., IF THIS IS TEN BILLION DOLLARS, NATIONAL INCOME IS FOUND TO BE APPROXIMATELY EIGHTY-TWO BILLION DOLLARS.

The figures for passenger-automobile and truck sales and for automobile registrations come from *Automobile Facts and Figures*, published yearly by the Automobile Manufacturers' Association.

part of the government expenditure will be to build plant and equipment which under our schema would come under induced investment; prosperity will not induce business to spend money on plant and equipment if the government is already doing so. Therefore, we must subtract something like \$1 billion to take account of this, and perhaps something in addition to take account of the fact that some normally private-built housing may come in the federal budget under the defense program. Also, there may be a tendency for state and local governments to take advantage of the prosperity to more than balance their budgets, and perhaps some subtraction should be made on this account. All in all, our "given" items might be assumed to run between \$10 and \$11 billions. On this assumption the national income (in 1935-39 dollars) by our calculation comes out to be from \$83 to \$88 billions, as can be seen by inspection of figure 7.

An increase of government expenditures by \$1 billion will, in our schema, increase national income by almost \$5 billions; in other words, the *leverage* of the expenditure is almost 5. An increase in all investment of \$1 billion will, in our schema, increase national income by about \$2 billions; the *multiplier* is about 2.

Similar estimates could be made for 1942. For this purpose, the predicted value of consumption for 1941 would have to be among the data used, so that the estimate would be subject to even greater error than that for 1941.

This method for estimating the national income necessarily takes into account only the power which defense expenditures have, owing to the consuming and investing habits of the community, of generating a multiple increase in national income. It can say nothing as to the technical possibility of producing such an income—the adequacy of the industrial and human resources of the country. If bottlenecks develop so that the real income which the government investment has the power to generate cannot be produced, then in one sense the method loses its value for prediction. But it is nevertheless just the method which a defense administration needs in order to judge whether and where bottlenecks are going to arise. For it is only by knowing what the demand for a given commodity or type of labor would be in the absence of restrictions of production that one can judge whether the supply of the commodity or

skill will be adequate. A defense administration would surely negate its general purpose if it should judge the adequacy of the supply of each particular item by assuming that bottlenecks everywhere else would restrict the demand for it. Similarly, the planners can tell when the labor supply as a whole will be exhausted only by knowing how great an expansion of real income could be generated in the absence of a labor shortage.

A detailed study along this latter line, deciding the point of national income under conditions of full employment, is not in place here. But a superficial, over-all relationship of equivalent full-time employment to national income was made. A downward time trend was found as a measure of the increase in productivity, and the deviations from the trend were plotted against national income. Assuming that the total available labor force is 55 million, full employment would be reached in 1941 at a national income (in 1935-39 dollars) of \$97 billions. A greater national income could be produced if hours of work were lengthened. Assuming the national income for 1941 to be \$85 billions, between 50 and 51 millions of men would be needed to produce it. This would leave 4-5 millions still unemployed.

This, then, is the method for predicting the level of the national income under the impact of the defense program. Doubtless other and better methods could be devised; but this seems to be at least illustrative of the general type of method which is suggested both by economic theory and by the statistical material available.

#### *Shortcomings of the Method*

It will be well to point out some of the dangers in the method. To begin with, the fits of the various lines to the data are by no means perfect. And when it is considered that the system is such that a change of a dollar in the given components of investment may change national income by as much as five dollars, it is evident that a slight error in only one of the functions in a given year may, by the time all its repercussions are felt, result in a considerable error in the final result.

Moreover, the ranges of national income which the United States economy is now entering are higher than any previously experienced, and there is no assurance that its behavior in these new ranges will be consistent with experience at lower

levels. The dangers of extrapolating statistical relationships to ranges not covered in the data from which the relationships are derived are well known.

This would be true even if the period for which we wish to predict were going to be a normal peacetime period; the fact that it is instead a period of emergency makes our difficulties all the greater. In a period of war it may well be that statistical relationships reliable in peacetime will not hold. For example, the defense prosperity is going to be based on income-producing expenditures which differ radically in their geographical and industrial distribution from the investments which would generate a peacetime prosperity. Also, under the influence of the psychology of national mobilization, the saving and spending habits of the community may change. Moreover, the fear of an early end of the emergency-bred demand for their products may lead businessmen greatly to increase their depreciation allowances. We cannot take account of these possibilities in a quantitative way, but they certainly must be considered in interpreting the results, and some judgment must be made as to the direction in which they operate. It may be expected that the two last-mentioned considerations would operate to reduce the propensity to consume, so that the national income should be somewhat less than that predicted by applying the peacetime consumption schedule.

All these dangers being admitted, we certainly cannot contend that our method is wholly satisfactory. But since it is imperative that estimates of the national income be made, the only important question is whether or not this method—or one like it—is more satisfactory than any other type of method which might be suggested. It certainly is better to base predictions on some experience, however inadequate, than on no experience. It is better to use quantitatively precise methods, interpreting the results as approximate, than to make vague guesses. And it is better to use methods which have a justification in economic theory than to use methods which have no economic sense.

#### ESTIMATING CIVILIAN DEMAND

*Illustrated by Steel*

Once we have in some manner secured an estimate of the national income, the second part of our problem arises—esti-

mating the civilian demand for a given commodity. The solution of this problem depends on the hypothesis that the level of national income is the major determinant of the demand for a commodity. For each level of national income there is, according to this theory, a structure of consumer demand and a structure of relative prices determined by the industrial organization. Thus, as national income increases, consumers will channel their demands into predictable fields and the business world will react in a consistent and predictable manner, so that the demand for any goods can be determined by knowing the national income. The hypothesis is not strictly that the pattern of consumer demand, the technology of industry, and the industrial organization should all be invariant over time. It is that they must change only gradually, so that the change may be accounted for statistically by a time trend. Now no one could contend that this theory was perfectly realized in the actual economy. That it is, however, sufficiently closely realized to be a fruitful hypothesis will become clear from what follows.

For illustration, we will attempt to find a method of estimating the civilian demand for steel. There are two methods which might be used for finding the relationship of steel consumption to national income. One is simply to find a relationship between national income and the aggregate consumption of steel. The second is to find relationships between the consumption of steel by each of the chief consuming industries and the activity in the industry, and then to find a relationship between activity in each of the industries and national income. The second method is particularly useful if it is desired to know not simply whether there is going to be a shortage of steel but what industries are going to be affected by the shortage and to what degree. These two methods will be considered in turn.

1. It is more logical to consider steel consumption to be a function of industrial activity than a function of aggregate national income. Therefore, the relationship which has been found for total steel consumption is with the Federal Reserve Board index of industrial production. This is not of great moment, because there is a close relationship between this index and national income (in 1935—39 dollars). (However, this relationship probably underestimates the index of production for the defense period, since there will be a shift in favor of the heavy industries.) It was found that the consumption of fin-

## TOTAL STEEL CONSUMPTION

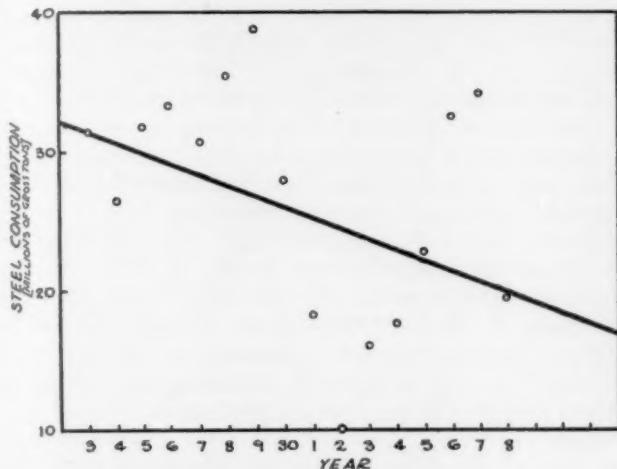


FIG. 8.

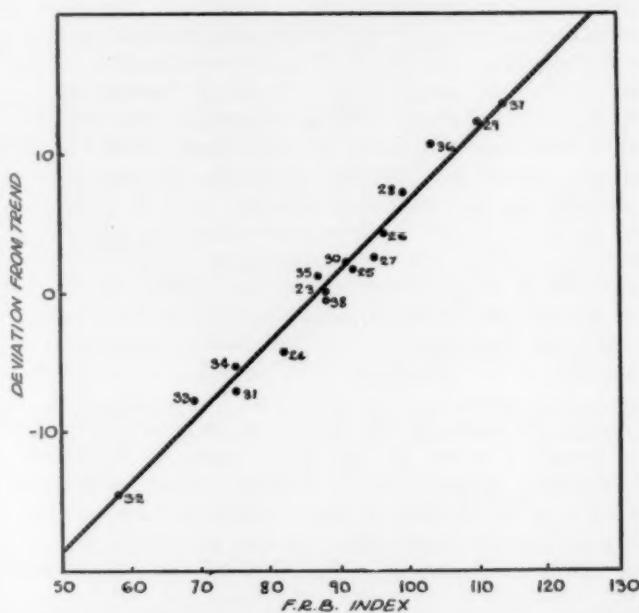


FIG. 9.

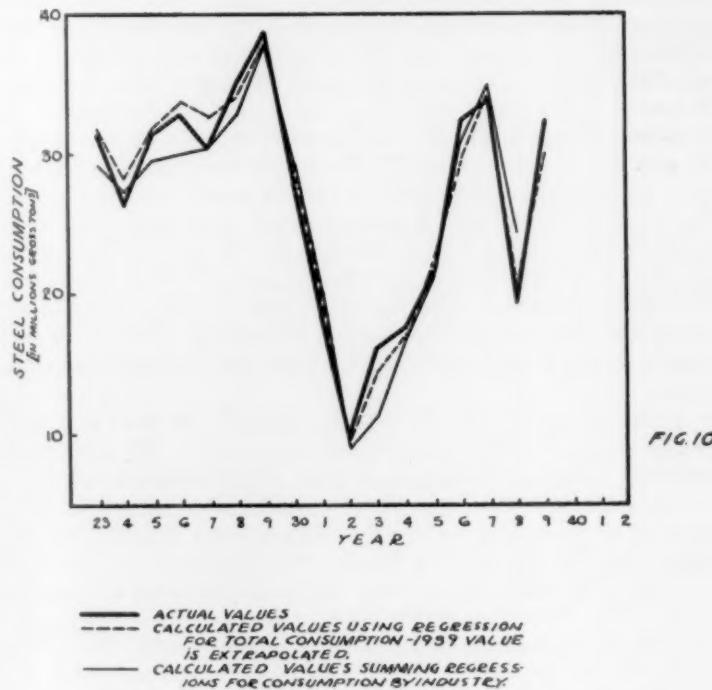
The figures for ton-miles of freight carried by railways are from *Statistics of Railways in the United States*, published yearly by the Interstate Commerce Commission.

The figures for consumption of canned foods are from *Patterns of Resource Use*, p. 103.

ished steel in the United States, given the level of industrial production, declined in the period 1923-1938. This decline is represented by the trend line in figure 8, which is drawn in the same way as other trend lines in this paper. In figure 9, deviations from this trend are plotted against the corresponding figures for the index of production. The line drawn through these points represents the relationship of industrial production and steel consumption. In figure 10 the broken line represents the total consumption of finished steel for 1923-1938 calculated by use of the lines of figures 8 and 9, and the heavy line represents the actual consumption of steel in those years.

2. For the purposes of the second method, the destination of finished steel can be considered in six classes: (1) automobiles, (2) construction, (3) containers, (4) railroads, (5) machinery, (6) miscellaneous industries. A relationship between industrial production and miscellaneous steel consumption can be found in the same manner as the relationship explaining the aggregate consumption of steel. We may take consumption of steel by the machinery industry as illustrative of the procedure involved for each of the other five classes. The relationship of the index of machinery production to national income (in 1935-39 dollars) was found. The relationship of steel consumption by the machinery industry to machinery production was then estimated; there seems to be a tendency through time to use less steel in machinery. Similar procedure was used for each of the other four industries. In some cases activity in the industry was related to industrial production, in some to national income, in one case to consumer income. This discrepancy does not matter, since we have functions relating all three of these variables. In some cases a time trend was found in the activity of the industry, and in some cases a trend was found in the industry's consumption of steel. In the explanation of the sales of passenger automobiles, the total registration of automobiles in the preceding year, adjusted to a constant population, was introduced as a factor. The explanation of railroad traffic involved the use of a logarithmic trend, and the ratios of actual to trend values, rather than the differences between the two, were correlated with industrial production. The accuracy of the division of steel consumption among these types of consumers is questionable, so that the results here set forth are chiefly of illustrative value. Nevertheless, the values

## TOTAL STEEL CONSUMPTION: ACTUAL AND CALCULATED



The figures for construction expenditure are from the *Statistical Abstract of the United States*, 1939. They are deflated by using the *Engineering News Record* index of construction costs.

obtained for total steel consumption by this method (the thin line in figure 10) agree closely both with the actual values and with the values obtained by the first method.

#### *Applying the Analysis*

Taking as our prediction for national income in 1941 \$85 billions, the value indicated for the index of production is 140. Using the first method of estimating steel consumption, 44-45 millions of gross tons of finished steel will be demanded for civilian use. Judging from the record of performance of the steel industry it takes about 1.35 tons of ingot steel to make 1 ton of finished steel. Therefore, there will be demanded for civilian use about 60 million gross tons of ingot steel. On top of this, there will be needed for military purposes and for export to Britain an estimated 18 million gross tons (20 million net tons). This estimate is almost certain to be too small. The total demand for ingot steel will therefore be at least 78 million gross tons, which exceeds the rated capacity of the industry—75 million gross tons. The second method of calculation, summing the demands of the various industries, yields an even higher estimate of the demand for ingot steel, 82 million gross tons.

It is of some interest to find the demand for steel at a national income corresponding to full employment. By our rough estimate this is \$97 billions, a figure easily within reach considering the probable increases in the defense program. At this level of national income the production index would reach at least 156. The demand for finished steel indicated by our first method is 52 million gross tons, which is equivalent to slightly more than 70 million gross tons of ingots. Again assuming British and American military requirements to be 18 million tons, the present capacity of the industry would fall short by 13 million tons.

Similarly it would be possible to test the adequacy of pig-iron capacity, of iron-ore capacity, etc., at various levels of national income. This illustrates the manner in which it is possible to use this method to discover where bottlenecks and shortages are likely to arise, where priorities or measures to expand capacity will have to be instituted.

The dangers of this method are of the same order as the dan-

gers of the method used for estimating national income: the difficulties of extrapolation into entirely new ranges of national income and industrial production, and the dislocations of the consumption pattern and the industrial structure incident to mobilization. Here again it can only be said that the results must be interpreted with these things in mind; in this case the consumption of steel is probably underestimated by applying to the emergency period functions derived from peacetime experience. Here again the question is not whether the method is wholly satisfactory, but whether there is a better method. The problems encountered by the defense administration present a challenge to economists which cannot be evaded. To meet this challenge, to answer questions which must be answered, it is perhaps necessary to subordinate, though not to forget, some methodological scruples.

## THE CONTROL OF INDUSTRIAL MOBILIZATION

*Wayne C. Grover*

By September 1, 1941, Congress had authorized the use of some fifty-six billion dollars for defense purposes, nearly twice as much as was spent for defense and Allied loans in the inflated dollars of the first World War. In June 1940, by withdrawing certain traditional standards governing expenditures, Congress had indicated that the funds should be spent with wartime urgency. This urgency, coupled with the size of the appropriations as they piled up in the fall of 1940, meant that, regardless of legal definitions of war, the conditions of war had been created for the industrial front. Governmental minds—military and civilian—seemed to be entirely unprepared for the middling period of intense war preparations without war which followed. For the second time in the twentieth century the spectacle of a democratic government attempting to improvise policies and emergency organizations to cope with the realities of total war was repeated.

There were some remarkable similarities during these two crises in the hesitant and somewhat agonized efforts to discover organizations and policies which would be effective for administrative purposes and suitably adapted at the same time to the multitude of conflicting interests. In the first World War a National Defense Advisory Commission became sufficiently well organized to go to work about one month before the war started. Five months later came the first major reorganization, the establishment of the War Industries Board, but without effective powers over either the economy it was to control or the governmental organizations it was to coordinate. The National Defense Advisory Commission of the present war was appointed on May 28, 1940, and some six months later came the first reorganization, producing the Office of Production Management, equally impotent. It was in March 1918, nearly a year after war had been declared, that the War Industries Board received sufficient authority to act with any degree of certainty; while it was some fifteen months before the establish-

ment of the Supply Priorities and Allocations Board, together with accompanying changes in the OPM, had produced comparable results in the second defense effort. Full control of the steel industry, perhaps the most important area of matériel control in a war economy, was accomplished in June 1918 after a long and arduous argument with steel producers concerning their capacity to meet war requirements and still distribute steel to their regular civilian customers; and after a somewhat similar argument the steel industry was again placed under full control in August 1941,<sup>1</sup> in both cases the period of lag running to approximately fourteen months.

#### THE DISTRIBUTION OF CONTRACTS

Perhaps these parallels have no more point than to show that the United States has been fortunate in having had time to allow war to take hold of its economy gradually. There are similarities which have characterized the evolution of policies and practices relating to the expenditure of funds, however, which in the light of military planning prior to the present defense effort need to be examined in more detail. In the first World War, as in the second, the authority to place contracts with producers was lodged by statute with the old-line defense agencies. A few discerning individuals among the civilians recruited by emergency agencies for this effort saw very early the necessity for a carefully planned distribution of contracts. Mr. H. E. Coffin, a member of the Advisory Commission, in a memorandum to a colleague dated May 7, 1917, a month after war had been declared and before any comparatively large appropriations were available, argued that the "widest possible distribution of this work, consistent with reasonable economy of production, is I believe essential to the maximum of insurance of the national safety and welfare."<sup>2</sup> And with a nice sense of *realpolitik*, he predicted the future:

" . . . Depressions in many lines of industry and in many parts of the country are sure to take place during any extended war. It is

<sup>1</sup> With the issuance of General Preference Order M-21, Aug. 12, 1941, by the Priorities Division, Office of Production Management. 6 *Federal Register* 4005-4007.

<sup>2</sup> Records of the War Industries Board in The National Archives. WIB 21A-A3: 56, "Munitions."

desirable to keep manufacturing and producing equipment busy throughout the country insofar as it may be possible. We must have successful and profitable industries throughout the United States if the cost of this war is to be paid from taxes upon profits rather than from taxes upon capital. . . . Moreover, we require the support of Congress in this great national undertaking. We can only have the support of Congress through insuring the support of the people in the local districts throughout the country. A reasonable prosperity through a wide distribution of munitions work will be one of the surest means of insuring the backing of the whole country. . . ."

Nevertheless, orders were concentrated in the northeastern Atlantic region, resulting in the winter of 1917-1918 in an epidemic of local shortages of power, fuel, housing, and labor and a virtual tie-up of transportation because of traffic congestion. Unfortunately for the record of civilian agencies, many of the orders placed in the early months of the war were apparently so placed on the advice of civilian business men not so wise as Mr. Coffin. Congressmen began to talk about favoritism. The War Department, recovering its balance after the first confusing impact of this new kind of war, reacted by handling its funds with considerably more circumspection, but perhaps with even less planning. On Feb. 5, 1918, Mr. Bernard Baruch addressed a letter to Secretary of War Baker which reveals the jurisdictional problem, by then becoming increasingly troublesome:<sup>8</sup>

"Some dislocation of our civilian industrial needs will necessarily take place but care, consideration, and proper coöperation not alone in the allocation and distribution of . . . raw materials but in building of new facilities and sources of supply, will lessen this dislocation and prevent confusion and competition in the obtaining of our military necessities.

"Even now with the greatest of care, I feel there will be many plants in some parts of the country filled to overflowing, while in other parts of the country factories will be closed and men out of employment. A study of the distribution of orders and the ability of those having taken them to fulfill them with the necessity of the redistribution of those orders to idle factories will have the effect, if not of preventing, of lessening this situation.

<sup>8</sup> Records of the War Industries Board in The National Archives. WIB 21A-A3: 2134, "Requirements."

"... The reorganization and strengthening of the various departments under you make coöperation and coördination in the distribution of these articles more necessary than ever."

Although as a result of the notable increment of authority which it gained in the reorganization of March 1918 the War Industries Board was able to assert in theory a certain amount of positive control over expenditures, this was one of those issues which had such wide ramifications in the fields both of policy and of administrative management that it could not be settled completely without basic reorganization, and the War Industries Board itself had arisen to power on the basis of a compromise to prevent basic reorganization. In the last weeks of the war, the War Industries Board, through its Facilities Division, was still endeavoring to get plans of new construction from the military services soon enough in advance of the actual letting of contracts to maintain its veto power over such construction.

Soon after the beginning of the second defense effort, there began again under the stimulus of civilian agencies the process of improvising policies and practices with respect to the distribution of orders. The evidence of this may be seen in the evolution of administrative organizations which sprang up during the course of the first 15 months of war effort. In the latter part of October 1940 the office of Director of Small Business Activities was established in the National Defense Advisory Commission to serve as a clearing house for information for "smaller enterprises."<sup>4</sup> At about this time also the Labor Division of the NDAC undertook a campaign which began as an effort to "revitalize the nation's 'ghost towns,'" to be accomplished principally by farming out subcontracts in order to use the latent labor and plant capacities of these areas;<sup>5</sup> and which continued with increasing emphasis on the necessity of a plan for subcontracting in all areas. After three months of this, the Office of Small Business Activities, which in the meantime had become part of the Division of Purchases in the Office of Production Management, was shifted to the Production Division of that agency, its staff was expanded, a field organization was created, and the name was changed to the Defense Con-

<sup>4</sup> Press release, NDAC, no. PR 204, Oct. 25, 1940.

<sup>5</sup> *Ibid.*, no. PR 209, Oct. 28, 1940.

tract Service. Two consultants on subcontracting who had been serving in an advisory capacity in the War Department were transferred to the new service.<sup>6</sup>

This arrangement lasted until August 17th, when the OPM—at last officially concerned over the imminence of priorities unemployment and recognizing the “undue concentration” of defense orders—raised its Defense Contract Service from a subordinate status in the Production Division to equality with this and other major divisions.<sup>7</sup> A few days later the War Department announced the award of the first contract upon advice of a Contract Distribution Division which had been “recently created” within the confines of its own Office of the Under Secretary of War;<sup>8</sup> and finally, on Sept. 6, 1941, announced a major revision of War Department policy governing the award of contracts.<sup>9</sup> By this time the matter had got to the President, who gave the movement his official sanction by renaming the Defense Contract Service in the OPM the Contract Distribution Division and outlining its duties.<sup>10</sup> The Navy Department then came forward with a Naval Contracts Distribution Division of its own,<sup>11</sup> so that by the middle of September this function had been dignified with high status in three organizations, all presumably working in unison to catch up with the problem already on top of them.

Evolution through improvisation is not a characteristic of planned activities, yet no lack of planning preceded the appointment of the NDAC in May 1940. The War and Navy Departments, carrying out a function assigned to the Assistant Secretary of War by Congress in 1920 to assure “adequate provision for the mobilization of matériel and industrial organizations essential to wartime needs,”<sup>12</sup> had prepared and revised from time to time an industrial mobilization plan looking toward the creation of emergency organizations. In addition, these agencies had themselves engaged in procurement-planning activities designed to assure themselves that orders would be placed promptly, without the spectacle of interagency and interbureau competition for supplies which had appeared in the

<sup>6</sup> Press release, OPM, no. PM 37, Feb. 3, 1941.

<sup>7</sup> *New York Times*, Aug. 17, 1941, p. 1.

<sup>8</sup> Press release, War Department, no. 505, Aug. 23, 1941.

<sup>9</sup> *Ibid.*, no. 547, Sept. 6, 1941.

<sup>10</sup> Office of Emergency Management, *Defense*, Sept. 9, 1941, p. 3.

<sup>11</sup> Office of Government Reports, “This Week in Defense,” Sept. 12, 1941, p. 8.

<sup>12</sup> 41 Stat. 764.

first months of World War I. When the emergency began, the latter plans were put into operation; the former were not. It appears that procurement planning did succeed in eliminating competition for supplies; otherwise, as the course of events narrated above would indicate, the plans for both the organization of emergency agencies and the distribution of orders ran into considerable dissident opinion.

#### DIFFICULTIES OF COÖRDINATION

There are two assumptions underlying military planning for industrial mobilization which events have proved to be unrealistic. One is in the sphere of politics, and it is the assumption that a war situation will terminate efforts to effectuate continuity in public policy. The other, although technically speaking it comes within the realm of administrative management, stems largely from the initial misconception. It is the assumption that a dividing line can be drawn between the authority to plan and execute a procurement program involving the expenditure of billions of dollars, and the authority to control civilian economic life and resources.

It is possible in peacetime to consider procurement as a service function of government which has as its chief concern the orderly, economical purchase of supplies, dissociated in the main from questions of public policy.<sup>13</sup> It is not possible to do so in periods when government expenditures for defense purposes dominate the economy, unless indeed the procurement program is ". . . coöordinated with the program of industrial controls"<sup>14</sup> supplied by emergency agencies; but this is public policy itself, the crux of the question. In the midst of diverse objectives and the pressure of institutional, political, and economic interests, whose concept of public policy shall prevail? Coöordination, the magic word, is easy to utter but difficult to accomplish.

Until the first World War the military services had been self-sufficient in the sense that they could rely primarily upon their own purchasing power in the market, coupled with the productive capacity of government-owned plants, to accomplish the

<sup>13</sup> Cf. Temporary National Economic Committee, Monograph No. 19, *Government Purchasing—An Economic Commentary*, by Clem C. Linnenberg, Jr., and Dana M. Barbour (Washington, 1940), p. 77.

<sup>14</sup> *Ibid.*, p. 54.

ends of military and naval supply. There was no need either for elaborate government controls or for civilian agencies to apply them. That epoch ended during this war because, economically, a competitive market could not produce orderly results on the scale and in the time demanded; politically, because the civilian population could not be asked to suffer the consequences in inflated prices, profiteering, and inequitable burdens which were being produced by the unplanned use of such massive purchasing power; and administratively, because the search for an equity to replace the customary equity of the market place inevitably led toward government.

The end of this epoch in military supply was signalized in the late summer of 1918 by a remarkable circular issued to supply officers in the War Department by General George Goethals, appealing for an understanding of the new situation. "On the part of some of our units this understanding seems not complete." Since the conditions of modern warfare, he said, demanded more than the mustering of armies, taxing productive capacity to its limit, the purposes of war included not only the mobilization of material resources but also the maintenance of the civilian population and the preservation of the economic fabric. "The provision of funds and unlimited power of purchase is not alone sufficient to this end. With governmental purchase must be coupled governmental power to control, administer, and mobilize industry and material resource."<sup>15</sup>

The solution adopted at this late moment in 1918—too late, as indicated earlier, to be fully understood before the war ended—was to interlock the supply agencies, which had the purchasing power, with the War Industries Board, which controlled resources, so that the defense agencies themselves would become "part and parcel," as the General hoped, of the War Industries Board. It should be noted—because it is a point which the military services did not utilize in their later planning, although it was perhaps the secret of whatever administrative success the War Industries Board finally achieved—that while the mechanism which allowed this was, as military plans later recognized, the commodity section of the War Industries Board, the technique upon which this mechanism depended was that the section should act as a unit. The chairman

<sup>15</sup> Supply Bulletin No. 22, Purchase, Storage and Traffic Division, War Department General Staff, Aug. 28, 1918.

of a commodity section was not to be considered as the recipient of a hierarchical delegation of authority. "The sections are to be regarded as boards of directors of the commodity with which they are concerned."<sup>16</sup> Army and navy officers serving in these sections were expected to consider themselves as much a part of the War Industries Board as the civilians; and they were to have sufficient authority to enable them to obligate their departments to act in accordance with decisions agreed upon. Policy decisions made in the sections could in theory be translated into immediate action in either the purchasing operations of the defense agencies or the production planning of the War Industries Board itself.

#### THE PROBLEM OF PERSONNEL

After the dismantling of this agency, the military-supply function returned entire to the military services. What amounted to a department of supply was set up within the War Department, under the direction of the then Assistant Secretary of War; and the Army and Navy Munitions Board was established to coördinate the procurement plans of the two services. When it came to planning for war, however, it was still necessary to dispose of the problem of interlocking the purchasing power, which the military services of course still retained, with the power to control resources. Two conditions governed the solution of this problem. One was the necessity of conforming to American political theory; the other, the conviction in the military services that personnel to man the control agencies should be selected from the business strata of the nation.

The political theory was expressed by the former Assistant Secretary of War, Mr. Louis Johnson, a few months prior to the outbreak of war in 1939. While every phase of civilian economic life might have to be brought under government control, ". . . the difference between the democratic and the autocratic method will be that here the work of control will be carried out not by men in the Army and Navy, but by patriotic civilians; by people who better understand the psychology of the American people; by mechanisms designed not only to win the war, but also to maintain democratic institutions. . . ."<sup>17</sup>

<sup>16</sup> *Ibid.*

<sup>17</sup> Address before Institute of Public Affairs, Charlottesville, Va. Press release, War Department, July 4, 1939.

The corollary to this theory, that personnel should come from among the business leaders of the nation, posed implicitly another condition: that some means should be found to secure the public interest against the charges of self-interest which a suspicious political atmosphere customarily engenders when business men take part in official determinations affecting their present or former personal interests. Congress in 1909 had passed a law to the effect that no person "directly or indirectly interested in the pecuniary profits or contracts . . ." of a firm could act as an agent of the government in doing business with that firm;<sup>18</sup> and in the years following the first World War, Congressional investigating committees—the Graham Committee immediately subsequent to the war and, later, the Nye Committee—had pursued with avidity any morsel of fact which might lead them to suspect that business men had profited by their connections with defense agencies. Hence the chief concern was at the point where funds are expended.

It appears that the military services expected to solve this problem by maintaining complete control of expenditures themselves. Rather than follow the directions implicit in the technique devised in commodity sections under the War Industries Board, it was anticipated that where there was a shortage of facilities, army and navy orders would not be allocated by the civilian control agency, but this agency instead would survey facilities and "allocate" them to the military services.<sup>19</sup> This process in practice would leave the military services in control of the purchasing power, since they were not bound to accept the recommendations in the form of allocated facilities; and the civilian control agency, so far as concerns the purchasing function, was therefore left with what amounted to a purely advisory function.

It would have been difficult enough to get responsible and unified planning and management had the organization plans of the army and navy been followed; it was bound to be immensely more difficult under the organizations which were actually set up. The National Defense Advisory Commission was by definition "advisory." Because the need for extensive control over resources did not come into sight immediately, the

<sup>18</sup> 35 Stat. 1097.

<sup>19</sup> Industrial Mobilization Plan, 1939 revision, published as Senate Doc. No. 134, 76th Cong., 2nd sess. (Washington, 1939), p. 9.

advisers naturally concentrated on the problem at hand: the placing of contracts. The military services were no doubt at a loss in any case to know to whom among the multitude of civilian advisers to listen. They proceeded, as might have been expected, to utilize the facilities which they had divided among themselves prior to the war, so that in April 1941 the Chief of Ordnance was able to announce that 95 percent by amount and 91 percent by number of ordnance contracts had been placed in accordance with prewar plans.<sup>20</sup> For the rest, the military services were content to rely largely on the traditional method of purchase by open competitive bidding.

#### COMPETITIVE BIDDING VERSUS NEGOTIATED CONTRACTS

The competitive method is not a planning device, but a device to avoid planning. It is admirably designed however to secure the objectivity of the administrator, and as such it has been fostered by Congressional statute continuously since the days of contract scandals during the Civil War. Its limitations have been recognized, of course, by the military services. The long campaign of the army after the first World War to obtain authority and funds for the placing of educational orders in peacetime was in part a campaign to overcome Congressional resistance to the abandonment of the competitive method of obtaining supplies. Following the fall of France, however, Congress was quick to authorize the navy to negotiate contracts for naval vessels or aircraft, machine tools, and "similar" equipment;<sup>21</sup> and the army was authorized "with or without advertising" to provide for new construction and the purchase of supplies, apparently without limitation as to categories.<sup>22</sup> Army regulations issued soon after the passage of this act nevertheless continued to emphasize the use of competitive bidding.<sup>23</sup> Negotiated contracts were to be used only when necessary to expedite the defense program, the general rule being to use the advertised contract. When the negotiated con-

<sup>20</sup> Address of Maj. Gen. Charles M. Wesson, Chief of Ordnance, at Cincinnati, Ohio. Press release, War Department, April 12, 1941.

<sup>21</sup> Sec. 2(a), Public No. 671, 76th Cong., 3d sess., approved June 28, 1940.

<sup>22</sup> Sec. 1(a), Public No. 703, 76th Cong., 3d sess., approved July 2, 1940.

<sup>23</sup> War Department, *Army Regulations*, 5-100, Aug. 7, 1940, par. 5c(2); and 5-240, Feb. 11, 1936, *passim*.

tract was resorted to, a competitive situation was maintained by obtaining informal bids.<sup>24</sup>

The military services were soon subjected to pressure for change, resulting from differences of opinion among administrative agencies concerning the extent to which new methods should be substituted for purchases made on the basis of competitive bidding. The development of this controversy made plain the difficulties which attend the separation of authority over purchases from the presumed authority of civilian emergency agencies to control resources.

The situation was not made easier by the fact that the new methods frequently could be made to serve a number of diverse purposes. The negotiated contract, for example, was from the military viewpoint a device serving chiefly to save time and, used at a minimum, to attack the problem of production at critical points. It could be used to advantage also where collusion among bidders was suspected; and where the objective was to secure producers who, because of their experience and the nature of their plant, were most capable of carrying out their contracts in the minimum time. But, as a planning device, it can also be used by the administrator to control the impact on the community of his program of expenditures and thereby to effectuate more readily the public policy of the political regime in power. The effect upon small business enterprise produced by the diversion of scarce materials to defense production can be cushioned; and war orders can be prevented to some extent from contributing to changes in the national economy which may accentuate the lack of balance so prominently displayed during the recent years of depression. The controversy therefore was not over a matter merely of devising a suitable purchasing technique; it involved control over the political direction of the war effort.

A statement of "General Principles Governing Letting of Defense Contracts," issued by the National Defense Advisory Commission on September 13, 1940,<sup>25</sup> appears to have been an attempt primarily to influence the military services to a more liberal use of the negotiated contract; otherwise it differed little in the principles enunciated from the concept already held in

<sup>24</sup> Hearings before a Senate Committee Investigating the National Defense Program . . . pursuant to S. Res. 71, U. S. Senate, 77th Cong., 1st sess., Pt. I, p. 27.

<sup>25</sup> Press release, NDAC, no. PR 97, Sept. 13, 1940.

the defense departments. Of eleven principles, five emphasized in one way or another the responsibility and capability of the producer. He should be able to meet delivery dates, be capable of producing materials of the proper quality, be morally and financially responsible, and preference should be given to those suppliers who had had prior experience with educational orders. Two principles dealt in a rather routine way with consumer protection and the maintenance of labor standards; another urged the avoidance of undue geographic concentration of orders, for reasons of military strategy as well as to avoid congestion and the consequent slowing down of production. The emphasis however was preponderantly in terms of the supplier's ability to produce, an emphasis very similar in intent to the War Department's definition of a "responsible bidder."<sup>26</sup> This probably represented a meeting of minds at the time between the military services and the representatives of corporative management who had been called into service with the Commission. Mr. William S. Knudsen, who later became Director General of the OPM, described his "prime responsibility" to a Senate investigating committee as that of seeing "that a ten-dollar fellow doesn't get a million-dollar job. . . ."<sup>27</sup>

The Commission insisted, however, that while competitive bidding "is the better procedure in certain types of industry and circumstances . . .," the principles it had outlined could not always be followed when contracts were placed on the basis of price alone and were let to the lowest bidder. No doubt officials of the War Department remembered the unfortunate experiences of that agency in the early months of the first World War, when business men who had brought "merchandising" methods into government procurement merely succeeded in arousing Congressmen to suspect the Quartermaster Corps of rampant favoritism.<sup>28</sup> The statement of principles at any rate did not succeed in changing the emphasis on competitive bidding in army regulations; and it was not until the concentration of orders in large firms had succeeded in bringing the issue to the surface of politics that action was taken.

The military interest in placing orders with firms equipped

<sup>26</sup> See *Army Regulations*, 5-160, July 27, 1936, sec. II, par. 5.

<sup>27</sup> Hearings . . . pursuant to S. Res. 71, *op. cit.*, p. 108.

<sup>28</sup> Maj. Gen. Henry G. Sharpe, *The Quartermaster Corps in the Year 1917 of the World War* (New York, 1921), pp. 160-161.

to turn out a finished product speedily is obvious. Large, integrated enterprises which can carry a product through all stages of fabrication relieve procurement agencies of much detailed planning. The wider the distribution of orders, the more likely that errors in planning and control will lead to unbalanced production of components going into a finished product. It was not illogical, therefore, for the Office of the Chief of Ordnance to advise district procurement officers, in 1938, to plan the placing of procurement schedules so that ". . . the nearer a complete item can be produced by one facility the better. . . ." <sup>29</sup> The difficulty with this procedure is that, once a producer has equipped his plant to manufacture an item, and so long as the competitive method is relied upon for procurement, he can underbid his competitors and overload his plant to the point where production is longer delayed than if smaller and less experienced manufacturers were brought into production.

#### SUBCONTRACTING

As soon as the concentration of orders with large firms became generally known, the pressure upon the military services to revise their procurement methods became fairly general. In April 1941 the Congress of Industrial Organizations charged that 85 percent of the contracts in excess of a million dollars awarded between June 1, 1940, and February 15, 1941, had gone to 80 companies, with two groups of interests controlling eight companies—the Bethlehem Steel Corporation and the Du Pont companies—receiving 23 percent of the total of \$9,231,300,000.<sup>30</sup> Representatives of the defense services told Congressmen that this process had been necessary in the interests of speedy production,<sup>31</sup> but criticism continued to gain ground. In August Mr. Knudsen explained the difficulties of his situation to a production clinic in New York in the following terms:<sup>32</sup> The armed services have the contracting power by statute; they must assume their share of responsibility for sharing work. They should accept subcontracting; use negotiated contracts rather than the bid system in order to favor a

<sup>29</sup> War Department, *Army Extension Courses*, Special Text no. 42, "Ordnance District Organization and Administration," (Washington, 1938), p. 43.

<sup>30</sup> Washington (D. C.) *Star*, April 7, 1941, p. 2.

<sup>31</sup> Hearings . . . pursuant to S. Res. 71, op. cit., pp. 60-61, 84.

<sup>32</sup> Office of Government Reports, "Information Digest," no. 271, Aug. 13, 1941.

community faced with unemployment; allow a contracting pool of manufacturers with an elected head to accept prime contracts; break up large contracts into smaller units; and—here is the administrative dilemma—inform the Defense Contract Service of his organization of all impending purchases *during* negotiations rather than after. This presumably was his explanation of the more or less pertinent fact that on all orders in excess of \$500,000 it had been necessary from the beginning to receive the approval of his organization.

On September 6 the War Department announced a revision of contracting policies which met some of Mr. Knudsen's objections, but did not abandon the principle of competitive bidding. Regional bidding was to be put into effect; "industries" could negotiate for contracts, either individually or in groups; awards in some cases could be made as high as 15 percent over the lowest quotation received or the last price paid; trial orders would be placed; performance bonds might be eliminated when necessary; inspection was to be facilitated; and in submitting bids on competitive work, new methods were to be used to encourage subcontracting.<sup>32</sup> Approximately one year had elapsed since the agitation for new methods had begun.

Since a controlled production process—from the allocation of raw materials through to the distribution of the finished product, whether for military or civilian purposes—is an interdependent process, it is doubtful whether the unnatural zones of authority set up in the planning of the military services can be maintained. As defense expenditures mount, the need of the civilian control agency (whatever one finally emerges) to synchronize all orders with an over-all program designed to keep the economy going during the emergency probably will lead it to seek increasing authority over all elements of the program. The exercise of a veto power over particular contracts is of course insufficient, since planning is an affirmative procedure and demands affirmative powers. In the meantime, there will continue to be duplication of effort, confusion in aims, and unnecessary friction among agencies concerned with the production program.

<sup>32</sup> Press release, War Department, no. 547, Sept. 6, 1941.

## THE NEED FOR EDUCATION

Basically the improvisation of plans and organizations which has characterized the present defense effort, as it also characterized the efforts in the first World War, does not spring from any peculiarly erroneous conceptions of planning, prerogative, or public interest, but from an educational failure. One of the delusions embraced in American military policy for many years was the idea that untrained militiamen could be expected in a crisis to spring to arms over night and, imbued with patriotism alone, carry all before them. Despite the loss in energy, money, and lives which this policy cost, it was not until the turn of the twentieth century that public policy began to recognize the necessity for an adequate system of military training in preparation for war. The leading proponents in this cause were officers of the regular army. It seems inconceivable that officers of the army could have believed that emergency organizations would, like the militia of old, spring up overnight in the government in full fighting form. A period of improvisation, of friction, of wasted effort, and perhaps of wasted money and lives as well, was inevitable.

The management of a war economy, like the management of military operations, calls for trained minds. It requires detailed planning and continuity in peace and war of planning, program, and institutions. It was not expected by the War Department General Staff, for example, that the personnel of its War Plans Division would be relieved of their duties as the nucleus of a General Staff at General Headquarters as soon as new personnel could be recruited. But army and navy officers who had laid the plans for industrial mobilization, as soon as they had assisted in the establishment of civilian control agencies, were expected to return to their "proper sphere of activity . . . in the field of actual procurement of the munitions needed by the Services."<sup>34</sup> Nor was it expected that a General Staff with troops could operate effectively unless it reflected the authority of the commander to control all the elements of his command. It is just as difficult to conceive of effective authority over industrial mobilization where positive administrative control of the purchasing function is separated on jurisdictional grounds from control of production and resources. Is procurement necessarily the "proper sphere" of military officers?

<sup>34</sup> Industrial Mobilization Plan, 1939, *op. cit.*, p. 13.

## CIVILIAN CONTROL OF MILITARY SUPPLY

Recalling the long and debilitating controversy in the nineteenth century between officers of the line of the army and staff officers responsible for supply, it could only be with caution that anyone would attempt to revive a jurisdictional argument over military supply. It was the theory of those times that the vesting of exclusive jurisdiction over matters relating to the supply of money, personnel, and matériel in "a great civil officer," the Secretary of War, "instead of in the officers commanding troops, was a wise distribution of executive power, whereby the armed bodies of men necessary for the purpose of government are rendered physically dependent, in their organized warlike capacity at least, on the responsible head of the civil Executive Department for War, answerable to the President who commands, and to Congress who 'supports,' such warlike bodies. . . ." <sup>35</sup> The situation however need not be considered in terms of such a negative and skeptical theory of civil supremacy. It needs to be considered rather in the light of the origin of a new function in the defense structure of government. Under past conditions of warfare it was possible to leave this function largely to private enterprise, without governmental intervention. In effect the supply officer stated his requirements to the market and the market—at a price—obliged. But it is now the civil government to which the supply officer must state his requirements and the civil government, under whatever conceptions of the public interest and whatever conditions of political leadership prevail, must assume the responsibility of fulfilling them. This function is, as General Goethals concluded a few days before the Armistice in the last war, "a main and separate function." <sup>36</sup> In the light of the experience of the first World War and what has passed of the second, it is proper to question whether it is necessary any longer to handle it on a militia-like basis of improvised organizations, improvised personnel, and to a considerable extent, improvised planning.

If the theory of civilian control must depend upon com-

<sup>35</sup> William A. DeCaindry, "The Establishment of the War Department as one of the Civil Executive Departments of the U. S. Government . . .," *Report of the Board on behalf of United States Executive Departments at the International Exhibition at Philadelphia* (Washington, 1884), vol. I, pp. 95-96.

<sup>36</sup> Supply Bulletin no. 29, Purchase, Storage and Traffic Division, War Department General Staff, Nov. 7, 1918.

promises of such dubious organic validity as those which have characterized military planning, then it might conceivably be in the interest of administrative efficiency, regardless of democratic conceptions of government, to allow military organizations to occupy the entire field. The distinction between military and civilian personnel, when Reserve Officers are recruited by the procurement services on the basis of "industrial and commercial background, rather than availability for military courses and active duty training . . ."<sup>37</sup> is at best vague. But while the objective of industrial mobilization is to implement the striking power of the armed forces, its processes are civilian and political and the competencies and judgments required in the personnel which undertake the task of management are also essentially civilian and political. It is not merely a problem involving the equitable distribution of wartime profits and burdens. Questions of lasting influence on the social economy of the nation must be decided. Decisions regarding the location of new plants, for example, while they may be limited in a negative way by considerations of military strategy which military personnel is alone competent to decide, may also be made in such a way as either to retard or to effectuate policies which must be decided at political levels and implemented one way or the other by the competencies of civilian technicians. The skills required are those of the industrial engineer, the population specialist, the economist, the political scientist, the expert, in short, who can devise a science of civilian logistics to fit the new patterns of total warfare to the ancient science of military logistics.<sup>38</sup>

It has been estimated that at least 75 per cent of the effort of the modern government at war is political and civilian.<sup>39</sup> Social

<sup>37</sup> War Department, *Army Extension Courses*, *op. cit.*, p. 15.

<sup>38</sup> Logistics is that branch of military science (or art) which deals in detail with the transport, quartering, and supply of troops in military operations. Although in this paper attention has been focused on supply, the term "civilian logistics" is used to imply that there is a field of study in modern warfare which goes beyond the traditional bounds of military logistics, deals not only with troops but with whole populations, and calls primarily for the application of civilian rather than military brain power. Nevertheless, I should like to add that it is not intended to imply at any point in this paper that a problem, jurisdiction, or skill should be isolated under one or the other of the word symbols "military" and "civilian," and there zealously guarded by protagonists. The effective exercise of human effort of course is dependent upon coöperation. In this field, above all, where coördination of effort at all levels of organization requires an intimate intermingling of individual talents, any insular tendencies are unfortunate.

<sup>39</sup> Maj. Gen. Frank R. McCoy, "A System for the Conduct of War by Our Democracy," *Proceedings of the Academy of Political Science* (May 1939), vol. 18, p. 365.

change is accelerated. "Whether we like it or not," as Mr. Donald Nelson remarked, the program of defense expenditures is itself an instrument of change. "Clearly, the only sensible thing to do is to make sure that such changes as the program brings to us are good changes instead of bad changes."<sup>40</sup>

The professional military officer is no more at home in this field than the civilian would be in attempting to accomplish a flank maneuver on the battle front. His primary interest, historically, has been to establish his competency, first, to conduct military operations with the minimum of political interference; and secondly, to state with authority the requirements in terms of personnel and matériel which military operations require. The American military officer has been singularly successful in this respect. It is a remarkable achievement, for example—even discounting the fervor which would naturally accompany an appeal for votes—when the Majority Leader of the House of Representatives could declare that to challenge the opinions and recommendations of responsible army and navy officers without profound knowledge that justifies an opinion to the contrary is, in an impending or actual crisis ". . . a dangerous course for any person, and particularly a Member of Congress, to take."<sup>41</sup> An army which commissions and puts into uniform persons who, on the basis of "industrial and commercial background, rather than availability for military courses and active duty training," would much better be out of uniform, is not adding to its integrity as a professional organization.

#### OBJECTIVES IN INDUSTRIAL MOBILIZATION

The type of governmental organizations and procedures which should be established to control industrial mobilization is of course an open matter. During the first World War there was a movement in Congress to establish for the duration of the war a Department of Munitions. The reorganization of the War Industries Board in March 1918, following upon President Wilson's delegation of authority to Mr. Bernard M. Baruch, is commonly supposed to have headed off this movement, on the ground that basic reorganization during wartime would disrupt

<sup>40</sup> Address before United States Chamber of Commerce at Washington, D. C. Press release, OPM, no. PM 337, April 29, 1941.

<sup>41</sup> *Congressional Record*, 77th Cong., 1st sess. (Aug. 8, 1941), p. 7073.

the war program. Since this reason is as good today as it was then, it can hardly be supposed that reorganization would come in any other way than through the processes of evolution.

There are a number of considerations which might be suggested tentatively as desirable objectives. In order to secure as much simplicity as possible in organization, the military procurement services should be divested of their military character. Coöordination with the military arms and services which use equipment could be obtained under procedures which already exist within the War Department, whereby the interests of the line of the army in the quality of equipment it receives are determined on the basis of a definition of the military characteristics of the item.<sup>42</sup> This would leave the procurement organization free to recruit civilian personnel on the basis of specialized competencies, and would make it unnecessary to set up a false distinction between military procurement officers and civilian control agencies. It also would make it possible for the War Department to be in peacetime what it should be: a true General Headquarters, concentrating on problems of training, matériel requirements, military logistics, and war planning. Under this arrangement a Department of Supply or Munitions could handle the details of production planning for both civilian and military needs; and it would be possible to develop under the Executive Office of the President, instead of the numerous emergency agencies which have been accumulated there, an Economic General Staff which would be concerned with control and supervision, for the President, of the entire government program. Coincident with the development of the Economic General Staff, it might be desirable to raise the Army Industrial College to a status equal to or superior to the Army War College—a College of National Defense.

A procurement organization must be permanent, in peace and war. But in the interests of continuity of planning, the cadres of control organizations and of the Economic General Staff also should be maintained in peacetime. This is in fact the heart of the matter. Civilian reserves should be trained no less assiduously for the wartime task of industrial mobilization than for the task of leading troops; and to these permanent cadres might well be assigned the training function.

<sup>42</sup> See *Army Regulations*, 850-25, July 23, 1936, "Development, Classification of, and Specifications for Types of Equipment."

The cultural problem of planning for war in years of peace is not alone a problem of technical detail, but of institutions and personnel capable of persistent effort. If it were to be assumed that competent civilian interest would again follow the curve of the 1920's and 1930's, then the function of planning for industrial mobilization in time of peace would perhaps be in better hands if it were left exclusively with the military services. However, it is doubtful if the assumption is valid. "The United States and Great Britain," as Mr. Winston Churchill stated in commenting upon the Atlantic Declaration, "do not now assume that there will never be any more war again. . . ."<sup>48</sup>

<sup>48</sup> *New York Times*, Aug. 25, 1941, p. 4.

## NATIONAL DEFENSE AND LOCAL GOVERNMENT

*A Case Study of the Quincy, Massachusetts, Area*

*Laurence L. Barber, Jr.*

THE current drive for national defense has affected American cities in varying degree. To most municipalities it has meant the loss of certain employees, especially from the fire and police departments. It has meant the creation of civilian-defense bodies in such fields as air-raid-precaution work. Finally, it has produced a general economic upswing which through increased employment and wage payments has aided municipal governments indirectly through an easing of their welfare burdens.

Certain areas throughout the country have felt a much more intensive effect from the defense program. These are the municipalities near military or naval establishments or within commuting distance of rapidly expanding industrial plants. Such areas face not merely the ordinary effects of wartime; they must also deal with the problems of increased population, both transient and permanent, increased industrial demands, and increased protection needs. A municipality containing one of these new or enlarged industrial plants has a dual problem. It must provide for the needs of the plant itself and for its attendant crowds of workers. It must also anticipate the service requirements of any new residents drawn by the plant's activity.

This article will discuss the effects of a huge industrial plant on three municipalities of different types. The plant is the Fore River shipyard of the Bethlehem Steel Corporation at Quincy, Massachusetts, now employing some seventeen thousand workers. The municipalities are Quincy, an industrial city, Weymouth, a working-class suburb, and Hingham, a rural upper-class suburb. The three lie side by side along the south shore of Boston Bay. Until recently they were united merely by their common dependence on Boston as their metropolitan center. Now this has been overshadowed by the impact on all three of the Fore River boom.

## ECONOMIC BACKGROUND OF THE AREA

Prior to the boom, Quincy was a city of 75,000 inhabitants, whose economic activities were divided almost equally between commuting to manufacturing and clerical jobs in Boston and similar employment at home. The local manufacturing was largely of a skilled machining nature, done in small plants. The average wage paid in 1935 was \$1,453, as compared to a state average of \$1,007. Seventy-five per cent of the population was native-born, and the rest was largely of British or Scandinavian stock. More than half the families owned their own homes. The city was almost completely built up, with a density of 4,661 people per square mile.

Weymouth was a town with a population of nearly 25,000, governed through a representative town meeting. Its over-all density of 1,258 per square mile was concentrated into three centers, and there was much open land of poor quality between them. Its valuation per capita of \$2,154 in 1935 would seem to indicate that it was a prosperous community. The figure is distorted, however, by the fact that of a total valuation of fifty million, twenty million was assessed upon the Edgar Generating Station of the Boston Edison Company. This plant, located on an island between Weymouth and Quincy, added to the tax or expenditure base of the town, but had no other effect upon the community. When the valuation figures were corrected for the town aside from this electric plant, the resultant figure of \$1,292 adequately showed Weymouth's slightly down-at-the-heel position.

Hingham, by contrast, was a prosperous rural suburb of 8,000 inhabitants, with one center, which was surrounded by estates and farms. It had retained the traditional town form of government, and the incoming suburban residents were largely of the wealthier professional or executive groups, or quiet retired people. Twenty per cent of the population was more than 55 years of age (15 per cent in the state as a whole). The assessed valuation in 1935 was \$2,107 (the state median was around \$1,200).

## THE NAVAL ESTABLISHMENTS

Within the Quincy area there are three naval stations, one in each of the municipalities under consideration. One of them, a dirigible base at South Weymouth, did not leave the paper

stage until September 1941. The other two are a Naval Reserve Aviation Station, at Squantum in Quincy, and a Naval Ammunition Depot in Hingham. Until the late 1930's both of these operated on a fairly small scale. Their recent expansion has had moderate effects on the area.

The Squantum Aviation Station has become an enlarged training center. Its territory has been virtually doubled by the taking over of an adjoining commercial airport. The expansion in personnel has been mainly naval rather than civilian. However, a small government housing project has been erected adjoining the station.

The Naval Ammunition Depot forms a buffer between Hingham and Weymouth. During the summer of 1941, plans were completed to expand the area of this depot, so that it would embrace about one fifth of the entire area of Hingham. The exact results of this on the town, especially in a governmental sense, are impossible to predict. It may be suggested that because of the "rural" nature of such an establishment and the desirability of keeping most of its operations well within the depot area, the chief result will be to curtail the taxable area of the town, to a greater degree than expenditures for services, such as roads, may be cut. On the other hand, the expansion will cut Hingham off further from the Weymouth type of residential development.

Allocations were made in July of 1941 for six and one-half million dollars for a naval dirigible base to be located in South Weymouth. The land to be used was assessed at only \$30,000 and thus was of little value to the town for tax revenue. The construction boom will be temporary, and the operation plans call for only about 500 men. It would seem that the long-run results for the Town of Weymouth would be small.

Both the original suburban development and the presence of the naval stations have had a continuing effect on the three municipalities up to the present time. The suburban situation, however, is little different from that elsewhere in Greater Boston, or indeed elsewhere throughout the nation. The naval situation has had little effect on the municipal governments so far. In Quincy and Weymouth the future effects will be small. In Hingham they will be somewhat greater, but also somewhat unpredictable.

## CURRENT EFFECTS OF THE FORE RIVER BOOM

The Fore River plant, however, exerts a definite and visible influence, not only on the people of the area but upon their municipal governments. Of approximately one billion dollars of defense contracts which had been awarded to Massachusetts firms by midsummer of 1941, five hundred million, or about one half, had been awarded to this one plant. This has meant tremendous expansion. In 1937 there were only about 5,900 wage earners employed in all the 123 industrial plants in Quincy. About two years later, Fore River alone employed nearly 6,000. By midsummer of 1941 the Fore River number had reached 17,000, and a complement of at least 25,000 was expected by 1946. While it should be remembered that a large proportion of the present 17,000 come from outside the Quincy area, these communities reap an inevitable harvest in providing services or retail-sales facilities, to say nothing of the inevitable pull of the Fore River area whenever any of those employees move their homes.

The direct influence of the plant and its increasing need for municipal services has been felt by the City of Quincy. On the positive side there has been the increasing valuation of the Fore River yard and buildings. In January 1941, this amounted to about 6 per cent of the total valuation of the city. The effect of the present boom is also seen in the figures for permits for manufacturing buildings. In the first five months of 1939 two such permits were issued, for the huge sum of \$1,420; in the similar period for 1940 none were issued. From November 1940 through July 1941, three individual permits for \$1,495,000 were issued to the Bethlehem Corporation alone!

The other positive effect of the plant's activity in Quincy has been a curtailment of the welfare load. Quincy welfare officials state that by January 1, 1941, their rolls had been cleared of all possible employables, and that their work was then limited to certain unemployables and to the so-called "category" relief. While figures released by the State Department of Public Welfare were not so optimistic, they did indicate that in December 1940 Quincy had only 167 employables on relief, only 45 per cent of the figure for December 1938. A large proportion of the 167 were women.

On the other side of the ledger, there were two major direct

effects. One was in the maintenance and construction of streets. By the middle of 1941 one street, about a quarter of a mile long, had been rebuilt to provide better access to the plant. Fifteen thousand dollars of city funds were spent on this. The city was also considering the widening, at a cost of \$125,000, of one street which ran the full length of the Fore River plant, and the rebuilding of one other at a cost of \$10,000. There was an increasing feeling on the part of the city fathers that the federal government should share the cost for the larger item. Three attempts to get various kinds of federal aid failed during the summer of 1941. A fourth attempt to get an allocation from the federal aid for defense areas was under way in September of that year. Regardless of the outcome of this, it was felt that an ultimate total expenditure of \$150,000 would take care of all street construction resulting from the Fore River activity.

The other major item of expenditure was for policing. While the Bethlehem Corporation naturally took care of policing within the yard, there were terrific traffic difficulties when the three shifts of men went to or from work. As a result, ten police officers were required for three hours a day each for traffic duty near the plant. Since it was felt to be impossible to divert men from the regular traffic details, the new traffic work had to be carried on by men diverted from patrol duty, thus curtailing regular police protection elsewhere in the city. In addition, one man was required, seven days in the week, for patrol duty near the plant. Every front or back yard within a half mile of the plant had blossomed out as a parking lot. These lots were occupied by thousands of cars, usually unprotected by the operators of the lots. Hence an additional burden fell on the police department.

Many defense plants have also increased municipal fire-fighting duties. Because of the nature of the work at Fore River, there is no unusual fire hazard. The Quincy fire department claims that it has had no additional work attributable to the boom and that the plant's private fire department has been entirely adequate for any needs without municipal assistance.

An item which might be put on the positive or the negative side of the ledger, depending on whether one takes a short or a long view, is the necessary construction of a ten-inch water line to the Fore River plant. Completed early in 1941, this cost

\$50,000, but under the method of financing, the water system will eventually be paid for from water rates. The Fore River yard, with a large water consumption as well as with 43 private hydrants, will pay its proportion of such rates.

A final and somewhat unexpected local result of the Fore River boom is found in the Quincy schools. Although the population of the city has steadily increased, school enrollment has been decreasing progressively since 1933. While this was partly caused by fewer admissions to the lower grades, it is noticeable that the high-school enrollment stopped growing in 1934. In 1941, 100 of the 800 seniors left school in May, as soon as their graduation was assured, to go to work at Fore River. This would amount to better than one out of every four boys.

Weymouth has felt a different type of effect from Fore River. It has enjoyed a building boom from the surge of population toward the shipyard area. Quincy is almost entirely built up; it has little room for housing expansion, and thus little additional service expansion has been needed. Weymouth, on the other hand, with cheap land and reasonably liberal housing and zoning regulations, is a mecca for low-cost building developments. For this reason, it is interesting to find that one of the major housing controversies in the area came from the efforts of the federal government to build a group of 70 four-family houses in North Weymouth. These were planned for a two-family zone, and the ensuing argument killed the project. While the new houses being constructed in Weymouth may in time build up a backlog of valuation for the town, in the immediate present they call for a great expansion of services. Typical of this was the construction of new water mains in four streets during the first half of 1941. Weymouth has followed, on the whole, a very conservative policy. Its 1941 budget allowed no increases over 1940, even in those items which might have called for service expansion. Since development has proceeded from three centers and is almost entirely residential, it has a large geographical spread of services already and is of a size where urban activities are offered. As a result, its police and fire departments, for instance, will need expansion only in proportion to population increase. According to its school census, the school population has been declining. As in Quincy, a large number of high-school seniors leave before the end of the school year for work at Fore

River. In fact, the drift in 1941 was more marked in Weymouth, taking 50 students.

Another indirect effect has been found in Weymouth: municipal competition with Fore River for labor, especially of the semi-skilled type. The Town of Weymouth has found it increasingly difficult to get labor for town construction or maintenance work at the old wages. It is now finding itself in a position where it must increase its budget to pay competitive wages, rely on the less efficient labor of older or poorly trained men at the old rates, or curtail its programs; *i.e.* do less work at the same total cost. Often overlooked, this is a situation which is faced by most municipalities affected by a defense boom.

Hingham is facing a general situation which is inherently the same as that of Weymouth. It has met it with greatly different policies. Because of the town's greater distance from Fore River, it has not been so attractive to the ordinary workman, who primarily desired an accessible home. Because of its more exclusive character, it is attractive to many skilled workers and executives from Fore River, who can pay with boom wages for the roominess and desirable services which Hingham can offer.

Hingham's chief method of meeting and controlling the impact of Fore River was by passage of a simple yet stringent zoning law. This ordinance recognized but two use districts: residential and business. Two-family houses were allowed if built in non-tenement style. A minimum lot area of 12,500 square feet was required for any house, with a frontage of at least 100 feet. This was coupled with a stringent building code. The net result was to discourage the building of houses in Hingham, unless the house and lot were to be of such value that they would produce a large amount of tax revenue.

The other method which Hingham has used to meet the actual and anticipated increase in population was a reappraisal of certain of its municipal activities, notably fire protection and schools. In the former, a program of purchase of apparatus and modernization of buildings has been coupled with study by special committees of the town meeting of such problems as the gradual shift from a small-town volunteer force to an urban professional department.

In the school department a self-consciously "progressive" program has been inaugurated as a result of two studies by

outside experts. Hingham has not as yet felt the increase in school enrollment which would seem indicated by its increasing population, but the town is bound to be ready when it comes.

Meanwhile, there has been a gradual expansion in other town services. The 1941 town meeting was asked to authorize the building of several new streets and the construction of various sewer extensions. An attempt is being made to force all new subdevelopers to install such facilities before the town accepts the subdivisions.

The most spectacular subdivision in 1941 was the "Bradley Woods" or Hingham Homesteads development, the first section of which comprised one hundred houses near the Weymouth line. This development is perhaps the most obvious civilian result of defense activity in Hingham, for it is regarded by the town as being inspired by the Fore River boom, and it is advertised as being financed through the F.H.A. as part of the defense program. The developing firm, however, admits that the \$6,500 price of its houses is above the purchasing level of most Fore River workmen, but states that it is perfectly willing to sell to any of the higher paid Fore River employees who wish to buy. Because of the slow sale of the houses, the developer has been forced to rent many of them instead, but has gone ahead with plans for a second group, of two-family houses, adjoining the original section.

As the first mass housing activity in the history of Hingham, "Bradley Woods" presents a situation of some worry to many residents of the town. It is presumably an indication, however, that metropolitan expansion, pushed a bit by the current Fore River activity, has now reached Hingham, and that more such subdivisions will come in the future.

Any boom such as this has two kinds of effects on a municipality. There are the immediate effects while the boom is on; there is also the readjustment when it ends. The immediate effects of the Fore River situation on each of these three municipalities seem to have been beneficial. All of them have faced mild increases in services, such as streets and water mains. Balanced against such expansion are increased economic prosperity and curtailed welfare expenditures.

## LONG-TERM EFFECTS

The ultimate effects, when and if Fore River again becomes merely a quiet commercial shipyard, are less favorable. Perhaps the happiest part of the picture is the fact that the municipalities may then switch from being suburbs of Fore River to being again suburbs of Boston. From the standpoint of municipal policy planning at present, however, this should not be relied on too heavily. An attempt should be made to treat the boom period as a unit, and to make sure that the municipalities face the end of the period in as good a financial position as possible.

Quincy appears to be well situated to weather the inevitable recession. Its valuations have not been raised because of boom values. The tax rate has been kept in the low thirties, slightly below the state median. Meanwhile the net debt has been cut steadily, ever since 1935, to a point where it now represents slightly above 3 per cent of the valuation. As stated before, Quincy is well built up with a complete network of services. Its expenses from now on will be more in the realms of maintenance and replacement. With its proximity to Boston and its relatively efficient municipal government and alert citizenry, Quincy should be able to take any post-boom depression in stride, even as it did after World War I.

In Hingham and Weymouth, the conditions are those of expansion rather than of stability. Hingham has chosen two methods of protecting itself against the end of the boom. One is to ensure that the new residents are not completely dependent on Fore River. Quincy relies on its proximity to Boston to ensure its post-boom prosperity. Hingham relies on the wealth, brains, and connections of its new residents. Another phase of this is the attempt, official and social, to make sure that any houses constructed in the town shall be of a tax-producing value which will pay for any services needed.

Hingham, like Quincy, has kept its tax rate and valuations steady. The tax rate has remained in the mid to high twenties. Meanwhile the net debt has been cut since 1928 from 3 per cent to .09 per cent. Thus the town has leeway in tax rate or debt to survive any cut in valuations, while its fine situation during the depression of the 1930's, combined with its steady growth of population, would indicate that even a drop in valuations was extremely improbable.

The other way in which Hingham has prepared itself for the next few years and for any recession is by a revision of administrative procedures in various functions. It would seem rather advisable for the town to carry this even farther, and to make as much as possible of the expansion and payment for its material plant within the next few years, while it is still in a boom period. Then the town could face a period of slower suburban growth with such items as streets and fire stations built and paid for.

This policy is certainly even more advisable for Weymouth. At present the town appears to be in fine financial shape. Its tax rate has stayed at \$25 for several years; its valuation is high; and its net debt has steadily been reduced until it is now less than 1 per cent of the valuation. Weymouth has a remarkable opportunity during these boom years. Presumably it should revise its zoning and building laws, to make sure that new construction is as advantageous in type and value as possible. But it should bend every effort to pay as much as it can of the municipal costs of the past, present, and future during these boom years. The existing debt, while small, should be paid off as rapidly as possible. The present physical structure, of streets, schools, and so forth, should be improved as greatly as needed. Certain construction needs of the future should be handled in the nearer future, while the boom lasts.

This is not to suggest that Weymouth, or to a lesser extent, Hingham, or even Quincy, should go on a spending spree. The needed spending should be carefully planned to accomplish three ends. The community should pay off past indebtedness, as completely as it can, to attain a cash basis of operation. This would mean a pay-as-you-go basis, extended to the past and future. The municipality should make new construction depend on a careful program of public works, with annual allocations and preferential priorities. Finally, Weymouth, even more than the other two municipalities, should take care that it enters any recession with as modern an administrative and governmental organization as possible. This may mean a centralized managerial administration. It certainly will mean modernization within the various departments. The aim should be to attain the most efficient and economical organization for an end-of-boom "normalcy."

The Fore River area has gained by the boom. Its municipali-

ties have had few increases in expenditures and a great increase in tax-producing prosperity. While they face a regional deflation at the end of the boom, they have an excellent chance to improve their already good financial position and face any recession with strength. This can be and should be the effect of national defense on municipal government in the Quincy area.

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Shortly after the completion of this article, the United States found itself at war. The result has been an intensification of all former defense efforts, and the addition of much that is new. The outstanding new activity in the Quincy area is to be a new "temporary" shipyard, located in Hingham at the Weymouth line. This means that Weymouth will find itself flanked by two huge yards, each employing between twenty and thirty thousand men. It also means that Hingham, already changed by the expansion of the naval ammunition depot, will now feel the effect of this new industrial development between that depot and the Bradley Woods subdivision.

Presumably the war changes will work to the benefit of Weymouth, drawing population to it and improving, at least for the duration, the somewhat gloomy picture outlined above. Hingham is the community to be watched. It is extremely doubtful whether it can hold its semi-rural, semi-aristocratic pattern against the housing needs of twenty thousand workers, unless the recent extension of the naval ammunition depot forms an effective buffer between the two. Unless that happens, Hingham will find itself a "boom town." The sudden change of population, and the financial, administrative, and political problems resulting therefrom, will be just as great as in any other small town near an army camp or a new industrial plant. Hingham may soon find itself with its not-distant neighbor Falmouth as one of the municipalities which has truly "given its all" for national defense.

## CHANGES IN ECONOMIC STRUCTURE ARISING OUT OF THE WAR AND THEIR IMPLICATIONS FOR PUBLIC POLICY

*Alvin H. Hansen*

### THE NEED FOR FLEXIBILITY IN PUBLIC POLICY

IMPORTANT structural changes in the world economic order grew out of the last World War. It is quite evident now that economic policy in the decade following the War failed to take adequate cognizance of these changes or underestimated them. Public policy was based too much on the assumption that one could act as though the economic order in its most fundamental aspects had changed not at all. It was a case of attempting to compress a changing world into the familiar molds of the pre-war period.

Following the present war, it may be suggested, we are less likely to make this mistake. For one thing, the great depression has profoundly altered public opinion and no less the views and judgments of the leaders of public policy throughout the world. We are not yet, it is true, adequately aware of how complete and thoroughgoing, for example, is the monetary revolution of the last decade, or of its implications with respect to public policy in the future.

The monetary revolution is only one of many structural changes which one might discuss, but it serves as a peculiarly valuable illustration. Admittedly in the monetary chaos which followed the World War it was not easy to find any satisfactory solution. But it is at any rate clear that the program followed was essentially along traditional lines unsuited to the postwar order. Countries were yoked together in a rigid international monetary system, which, as events proved, was far too inflexible to be workable. It does no good to argue that the unruly social forces which basically underlay the breakup of the rigid gold standard should have been rigorously controlled. For example, the resistance of the trade unions and the labor movement in general to drastic deflation in some countries adequate to restore international cost-price, exchange-rate equilibrium could proba-

bly not have been overcome short of a thoroughgoing military dictatorship. All history shows that the continuance of evolutionary progress in government requires a high degree of flexibility and adjustment to changed social forces; and that the effort to compress these forces into traditional molds produces, sooner or later, social and political revolution and economic chaos.

I am not suggesting, I hasten to add, that monetary flexibility alone could have coped with the torrential stream of economic and political forces flowing from the first World War. Indeed, it is probably true to say that, unless supported by positive governmental policies with respect to the control of investment, monetary flexibility alone would have been even more dangerous than the gamble on the workability of the gold standard under postwar conditions. But in this respect also we have learned very much from the experiences of the great depression.

One deeply significant difference with respect to public policy distinguishes this war from the last war. Then the overwhelming consensus of opinion accepted without question the policy of returning as rapidly as possible to the *status quo ante*. Today this is certainly not the case in any country. Everywhere public opinion and public leadership recognize not only that the world has profoundly changed already, but also that the pace of change is at a rate perhaps unprecedented in all history. Inventiveness, flexibility, and bold implementation are essential elements in any public policy which hopes to cope at all successfully with the world which will emerge from this war. Indeed, the war itself can in large measure be explained as the product of the economic and political frustration following from the timid policies of an outworn tradition. Underlying the war are the deep, organic changes which the whole of modern society is undergoing. The most hopeful thing about our times is the growing recognition that this is the case and the increasing readiness to accept the implications with respect to public policy.

#### FULL AND EFFICIENT UTILIZATION OF RESOURCES

The central goal and aim of economic policy is now, and presumably always has been, the most efficient full utilization of economic resources. What ends this efficient utilization of

economic resources should serve is a question partly of ethical values and partly of social and political power, and these have certainly varied from period to period. But it is important to start with the fundamental thesis, which presumably has been accepted, consciously or unconsciously, as the goal in all periods, that the basic economic problem is to secure the full and efficient utilization of our economic resources.

In the achievement of this goal the world failed most miserably in the two decades between the two World Wars. The great industrial nations which control the bulk of the world's resources failed to make adequate use of these resources not only in the interest of their own people, but also (and indeed in large part because of this failure) in the interest of those peoples less adequately endowed with natural resources. Out of this failure sprang the breakdown of the world economy and political security.

#### DEPRESSIONS A DANGER TO FREE ENTERPRISE

One lesson stands out with great clarity from the experiences of the last two decades. It is no longer possible to accept the thesis that cycles of prosperity and depression may be complacently regarded as a characteristic of a system of free enterprise and private property. In the modern world no system can survive which permits the continued recurrence of serious depressions. Should it prove true, as some still argue, that periodic depressions are an inevitable concomitant of private property and free enterprise, then this system is doomed. I am not able, however, to accept the thesis that economic fluctuations cannot be controlled. The democratic countries are committed, and apparently with the overwhelming majority view of their citizens, to the survival of a system of free enterprise. The successful pursuit of this ideal will be determined by the degree of success achieved in overcoming depressions and in reaching a substantial approximation to full employment.

In recent years there has been much discussion with respect to structural changes in the economy which lead to underemployment but are unrelated to the fluctuations of the business cycle. As a result of these controversies the point has perhaps been lost sight of that, regardless of the truth or falsity of the newer formulations with respect to underemployment

equilibrium, we are confronted with the inescapable fact that our modern societies cannot survive the kind of depressions we have had in the past, including even the kind of depressions we had in the last quarter of the nineteenth century. It is therefore less a problem of the changing character of depressions than it is a problem of the changing character of society and its reaction to these depressions. This fundamental fact has too frequently been overlooked in recent controversy.

Thus we are confronted with the very crucial issue which runs, overtly or implied, through pretty much the whole of economic literature. Either we must be prepared to suffer the consequences of depressions or else we must devise special means to overcome them at the moment when they begin to overwhelm us.

Social policy, if indeed there is to be any with respect to this problem, must be directed mainly toward overcoming impending depressions. This statement, however, obviously does not imply that economic organization may not be responsible for all manner of economic ills, including the severity of depressions; it in no way implies that public policy should not be directed toward remedying these ills. The statement merely suggests that no matter how perfect the economic organization in a system of free enterprise, depressions will occur unless government intervenes with a positive program designed to maintain reasonably full employment.

The main practical question therefore is, what are we going to do about these depressions when they occur? Shall we let them run their course, as has frequently been advised in the past, or shall we take definite measures designed to promote continuous prosperity and full employment?

This is the essential issue. I am suggesting that the experience of the last two decades indicates the urgency of exerting the utmost effort to achieve continuing prosperity and full employment, if we wish the system of free enterprise and democratic institutions to survive. Between the two wars we witnessed the destruction of free enterprise and political institutions in approximately half of the world.

#### ANTI-DEPRESSION POLICY

It is just with respect to this problem of maintaining reasonably continuous prosperity and full employment that striking

advances in public policy have been made. In the economic area these new implementations constitute in a significant sense the "arsenal of democracy." They are the only weapons that have so far been devised which give any promise of stopping, whatever the outcome of the war between nations may be, the advancing tide of a totalitarian economic order.

I am quite aware that there are many who take the view that a positive governmental program, involving a vigorous fiscal and monetary attack on depression and unemployment, is merely another road to economic fascism and totalitarianism. I should like to suggest that this view at the very least is certainly far from conclusive. I would suggest further that the consequences of the acceptance of this thesis by those in charge of public policy almost inevitably must be to continue the inaction and frustration characteristic of the policies between the two great wars. Admittedly we are living in a world where a new program of positive action represents a considerable gamble. Indeed, when in history was this not the case? Let it not be forgotten that a program of inaction may well be a far more dangerous gamble. The decade between the two wars was characterized by timid leadership and not by bold inventiveness and active policy.

It is one of the great errors of much economic thinking to concentrate too exclusively upon the functioning of the price system, particularly its impersonal aspects, and to overlook the tremendous role of changes in technology operating upon economic development and economic organization and thence upon the functioning of the price system itself. Economists have not devoted too much attention to economic theory, but they have devoted too little attention to economic history. This is certainly not the fault of the great classicals, whose analysis placed heavy emphasis upon the role of the "real" factors, and particularly the role of invention, technology, and the active promotion by innovators of great new developmental projects.

The view that it is dangerous for a government to play any important role in the initiation and promotion of developmental and innovational projects requires re-examination in the light of the historical development of modern capitalism. It is a striking fact that the bold innovators who founded our federal system did not hesitate to employ government as an innova-

tional instrument in developmental programs. Alexander Hamilton organized a government bank which played an important role in the early economic development of our country. The role of government in the building of our transportation system from the very beginning and throughout our entire history has been quite inadequately recognized. Government played an indispensable role in the development of the early turnpikes and canals. It undertook a gigantic subsidization of railroad development, particularly the great transcontinental railroads. The network of hard-surfaced roads, entirely a governmental project, represents one of the first-rank investment outlets in the last decades. It has always been recognized that there are certain types of developmental projects which cannot be undertaken except by collective action of the entire community as represented by the government. It is, moreover, clear that many developmental projects would have been unduly delayed, if indeed not frustrated, except for government support and aid. One of the most important problems of public policy today is to search out the areas in which government may function appropriately, either directly or indirectly, to promote developmental projects comparable to the great innovations of the nineteenth century, which led the way toward a higher productivity and a rising standard of living.

#### PUBLIC POLICY IN INTERNATIONAL ECONOMIC RELATIONS

What I have said thus far relates mainly to internal policy. I turn now to structural changes in external economic relations. With respect to external relations we have equally experienced a revolution in our thinking. We have learned that international programs designed to promote security and balance have no chance of success in a world suffering from violent fluctuations of employment and income. We have learned that international policies must be built upon the firm foundation of an internal program designed to promote full employment.

In consequence of the last war and the peace settlement, Germany underwent nothing short of a revolution with respect to her balance-of-payments position with the rest of the world. On the one side she lost her foreign investments. On the other side she was required, under the reparations arrangements, to make large annual contributions abroad. At the same time the

great rationalization and developmental program undertaken by her industries and cities after the war called for an immense amount of internal investment, a high level of output in her heavy industries, and accordingly a large volume of raw-material imports. A temporizing solution was found in the extraordinary volume of foreign loans that poured into Germany in the postwar decade, both on long term and on short term. It was inevitable that a volume of lending of this magnitude could not continue.

In the current war England is in process of experiencing a somewhat similar revolution in her balance-of-payments position with regard to the rest of the world. On the one side, she is using up her foreign assets, and her competitive position with respect to both merchandise and invisible exports is being seriously affected. Thus certain sources of foreign exchange upon which she has relied in the past are shrinking. On the other side, the vast physical-reconstruction program which England will need to undertake when the war is over will require an increased import of raw materials. Thus it is expected that England will be confronted with a serious gap in her balance of payments.

This structural change in the English international position may be regarded as a major world problem, upon the solution of which the course of international relations will fundamentally depend.

Confronted with this situation, England has various alternative solutions open to her, some of which however may be quickly discarded as quite impractical. It may doubtless be argued by some that the solution is quite simple; that all that is necessary is for England to let the exchange control go and permit the free-market forces to establish an equilibrium level at which the balance-of-payments problem is solved. A substantially similar solution would be for England deliberately to depreciate her currency on a planned basis, operating under sufficient controls to regularize the depreciation and to prevent erratic and chaotic fluctuations.

This proposal, I submit, is wholly impractical and unrealistic. The first suggestion invites chaos in international prices and exchange rates, since it throws the market open to the free play of speculative forces. The second proposal is equally unrealistic, since it completely disregards the retaliatory action

which could certainly be expected from other countries. If England undertook a deliberate major depreciation of her currency, it may be regarded as conclusive that a very large part of the world, particularly that which in recent years has come to be known as the "sterling area," would go along with sterling and thereby give England no relief. Moreover, it may also be regarded as a certainty that the United States would not again stand by, without counteraction, and suffer the internal price derangement and deflation, particularly of her important agricultural and raw-material prices, which she did suffer from September 1931 to April 1933. The experience of the last decade should indicate conclusively that the way would not be open for England to seek an equilibrium position through drastic exchange depreciation. Such a solution is at times feasible for a small country but under current conditions is no longer available for a major country.

Moreover, it may be pointed out that the role of exchange rates in effecting equilibrium in the balance of payments, while important within limits, is incapable of filling any serious gap in the international position of a major country without very disturbing results, both with respect to the internal economy of the country in question and with respect to the whole international structure. We have come to realize increasingly in recent years to what a large extent the flow of exports and imports is determined by the basic natural resources and traditional skills of a country. To bring about any large quantitative change in the magnitude of merchandise exports or of personal services purely through the price mechanism is likely to require so drastic a shift in price or exchange rates as to disturb profoundly both the internal relationship of import industries relative to export industries and the structure of prices in competing and in importing countries. Concretely, we need to examine into the price elasticity of the demand for British exports. Britain, suffering from a gap in her balance of payments, may attempt to push down the price of her exports through exchange depreciation to a level so low as to cause seriously disturbing reactions both at home and abroad. If the price elasticity of demand for these exports is in fact less than unity, the physical expansion of exports would not result in any expansion in *value* of exports. And it is the latter which must be achieved in order to obtain relief in the balance-of-payments

position. Under these circumstances, it is necessary to obtain an expansion of demand in the world market; in other words, an upward shift of the demand schedule for British exports.

The fundamental question is how to bring this about. The situation is very analogous to that of established industries in a period of depression. Typically they are confronted with an inelastic demand curve. Accordingly they cannot enlarge their volume of sales by a drastic reduction in price. Industry awaits a general increase in demand—an increase in the aggregate demand for all sorts of commodities. This awaits a general expansion of purchasing power throughout the whole economy. Such an expansion of purchasing power in the typical recovery movement is brought about through a recovery of private investment stimulated by continued exploitation of innovative developments or by a positive expansionist governmental program. In a similar manner, what is necessary to restore international equilibrium is a general expansion in purchasing power throughout the world and a consequent upward shift of demand schedules generally, resulting in the international sphere in a large increase in world trade.

Admittedly it does not automatically follow that a high level of prosperity throughout the world, and the resulting high volume of world trade and general world-wide demand for the products of foreign countries, will of necessity fill the gap in a country situated as England will be after this war. It will still be true that the natural resources, the innovative and developmental achievements of different countries, and the traditional skills in different nations basically determine the sources from which the supplies demanded in a prosperous world market will come. What is true, however, is that a prosperous world with a high general level of activity and employment and a consequent large volume of world trade provides the most favorable condition for reaching an equilibrium position for all countries.

#### INCOME ELASTICITY OF AMERICAN IMPORTS

Now the most important single factor affecting general world prosperity under modern conditions is the level of income in the great industrial countries. The United States, in particular, it is evident from the experience of recent decades,

plays a predominant role in world prosperity. The income elasticity of American imports is very high. As output in our great mass-production industries rises, and we approach a full-employment income level, the imports of raw materials rise to large magnitudes. At a full-employment income level the United States imports vast quantities of raw materials from Canada, from the Far East, from Latin America, and from other parts of the world. Moreover, at a full-employment income level, even with our high tariff, we import large quantities of specialty and luxury products from the more advanced industrial countries. In addition, after the last World War a high level of income in the United States induced an unprecedented volume of tourist expenditures abroad. It may be expected that the great development of travel by air will place this item in our invisible imports on a level vastly higher even than that of the twenties. A nonstop flight from New York to London in ten hours is certainly not improbable, and at fares so low as to permit even brief vacations in England. Indeed, the development of American tourist travel in England may well become a major solution for the British exchange problem. Internal American prosperity spreads purchasing power throughout the world and tends to promote a high volume of world trade in goods and services.

#### WORLD STABILITY DEPENDENT UPON FULL EMPLOYMENT IN THE MAJOR COUNTRIES

If the United States continues to experience violent industrial fluctuations, there is little hope for world stability and progress. On the other hand, the United States cannot shoulder alone the task of promoting world-wide prosperity. Divergent policies in different countries intensify the difficulties confronting any one country in its effort to achieve full employment. International collaboration on internal programs designed to promote full employment must be a major aim of economic policy after this war. Collaboration leading to co-ordinated action to prevent both inflation and deflation, and thus to maintain internal full employment under conditions of international equilibrium and stability, is essential. Moreover, this needs to be supplemented by collaboration among the more advanced countries to promote investment in the industrially backward countries. It will be necessary to conduct an exten-

sive survey of international resources on the basis of which large developmental projects may be undertaken designed to raise the productivity, the purchasing power, and the standard of living of the backward areas. River-valley developments, public utilities, railroads, roads, airways, together with suitable manufacturing and agricultural developmental projects, must be undertaken in China, Central and South America, the Balkan countries, Africa, and India.

#### INTERNATIONAL DEVELOPMENT PROJECTS

Former methods of foreign lending and investment are no longer suitable from the standpoint of either the lending countries or the borrowing countries. New machinery must be devised. In this development the relatively new device of the Government Corporation or the Government Authority is likely to play a major role. An International Development Corporation, a sort of International R.F.C., might prove a suitable foreign lending device. On the other side, it is important that the developmental projects in the industrially backward countries should be undertaken as far as possible by domestic corporations or authorities and by private foreign corporations only under license and control by an international development authority. Collaboration and assistance, particularly with respect to technical skill, will of course be required from the lending countries.

#### INTERNATIONAL ECONOMIC COLLABORATION

Through some such system of international lending the policy of coördinated international collaboration to promote internal prosperity in the industrial countries could be widened to encompass the entire world. Clearly the promotion of developmental projects in backward areas would reinforce the internal programs of expansion in the advanced industrial countries. In this manner domestic economic policies would be geared into a program of close international collaboration. The nationalistic competition of different nations (with which we have been so familiar in the past) for external markets as a means to secure prosperity, leads to international ill will, cut-throat competition, and economic and political chaos. A coördinated program of full employment affords a basis for the promotion of international good will and political security.



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